(30,343)

Supreme Court of the United States

OCTOBER TERM, 1924

No. 583

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney-General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon,

Appellants,

vs.

THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY,

Appeal from the District Court of the United States for the District of Oregon

Brief of Appellant, Isaac H. Van Winkle

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(30,548)

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1924

No. 583

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney-General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon,

Appellants,

vs.

THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY.

Appeal from the District Court of the United States for the District of Oregon

Brief of Appellant, Isaac H. Van Winkle

STATEMENT

The respondent is a religious society incorporated under the laws of the state of Oregon, and, as such, conducts private schools at various places in said state, in connection with which it owns and maintains buildings and equipment.

It is alleged in paragraph nineteen of appellee's amended bill of complaint that approximately 9,000 children between the ages of eight and sixteen years are now attending private grade schools in the state of Oregon.

For many years the statutes of Oregon have required parents, guardians, and other persons having control of children between and including the ages of nine and fifteen years, to attend public schools, but have contained a proviso exempting children being taught in private or parochial schools such branches as are usually taught in the first eight years of the public schools, and also exempting children physically unable to attend school, and those who reside at a distance from a school.

On July 6, 1922, an initiative petition for the submission to the people of the state of Oregon of an amendment to section 5259, Oregon Laws, was duly filed, and the said measure was submitted to the people at the general election held November 7, 1922, and approved by a majority of the votes cast thereon at said election. The said act and the amendment thereof will be found set out in full at pages 65 to 68 of this brief.

On December 22, 1923, the appellee filed in the District Court of the United States for the District of Oregon its amended bill of complaint, in which it prayed:

> "* * * that said pretended law be declared unconstitutional and void, and that this honorable court grant unto plaintiff its interlocutory writ of injunction enjoining and restraining said defendants and each of them and all persons claiming to act under their authority or direction or control from enforcing said pretended law on or after September 1, 1926, and from now threatening or giving out that they or either of them will enforce said pretended law on or after September 1, 1926, and from publishing or declaring that said pretended law is valid, and that this honorable court will call to its aid in hearing this application for an interlocutory injunction a Justice of the Supreme Court of the United States or a circuit judge of the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, and that upon such hearing the interlocutory injunction herein

prayed for be granted and made effective pending the final hearing and decision of this cause, and that upon such final hearing the said injunction shall be made perpetual, and that plaintiff may have such other and further relief as to this honorable court may seem equitable in the premises."

The grounds of invalidity are alleged in paragraph five of said amended bill of complaint to be as follows:

"1. That said pretended law attempts to deprive plaintiff of its property without due process of law in violation of that clause of section 1 of article XIV of the amendments to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

"2. That said pretended law attempts to deprive parents of their right to direct and control the education of their own children, and to deprive children of their right to acquire useful knowledge in private schools, and to deprive teachers of their right of engaging in the useful and lawful and lucrative occupation of teaching children in the eight primary grades in private schools, and to deprive plaintiff of its right to maintain and conduct its said grade schools in the state of Oregon—all in violation of the clause of section 1 of article XIV of the amendments to the Constitution of the United States which provides that no state shall deprive any person of liberty or property without due process of law.

"3. That said pretended law attempts to impair the obligation of the contract between the State of Oregon and the plaintiff arising out of the aforesaid corporation laws of said state and the incorporation of the plaintiff thereunder, in violation of section 10 of article I of the Constitution of the United States, and of section 21 of article I of the Constitution of the State of Oregon.

"4. That said pretended law attempts to delegate arbitrary and unlimited power and authority to the county school superintendents of the state of Oregon to determine when any child between the ages of eight

and 16 years shall attend the public grade schools of said state, and when any such child shall be exempt from the provisions of said pretended law, in violation of those clauses of section 1 of article XIV of the amendments to the Constitution of the United States, which provide that no state shall deprive any person of liberty without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"5. That said pretended law attempts to control the free exercise and enjoyment of religious opinions and to interfere with the rights of conscience in violation of section 3 of article I of the Constitution of the State of Oregon, and of that clause of section 1 of article XIV of the amendments to the Constitution of the United States, which provides that no state shall deprive any person of liberty without due process of law.

"6. That said pretended law attempts to abridge the right of parents in the state of Oregon to send their children to private schools in other states of the United States, in violation of that clause of section 1 of article XIV of the amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

"7. That said pretended law is void for that it embraces subjects which are not expressed in its title in violation of section 20 of article IV of the Constitution of the State of Oregon."

The case came on for hearing in the district court, before three judges, upon the application for an interlocutory injunction and on the 21st day of March, 1924, an order for interlocutory injunction was filed in said case by which the defendants were restrained from enforcing or attempting to enforce said act, and it was provided that such interlocutory injunction shall remain in force until the final hearing and determination of the said suit.

The matter is brought to this court by an appeal from the said order for interlocutory injunction.

ASSIGNMENTS OF ERROR

The appellants assign for error:

I

That the court erred in enjoining the enforcement of the statute enacted by the electors of Oregon under the initiative on the 7th day of November, 1922, and set forth at large in the thirteenth paragraph of the amended bill of complaint, which statute is also set forth as chapter one of the General Laws of Oregon for the year 1923 in the compilation of the said General Laws of Oregon officially published by the State of Oregon.

II

The court erred in holding the statute set forth at large in the seventh paragraph of plaintiff's amended bill of complaint, which statute is also described as chapter one of the General Laws of Oregon for the year 1923 as violative of the constitutional rights of plaintiff.

III

The court erred in holding that the statute set forth at large in the thirteenth paragraph of the amended bill of complaint of plaintiff and published as chapter one of the General Laws of Oregon for the year 1923 is unconstitutional and void.

IV

The court erred in holding that plaintiff is in a position to raise the legal questions relied upon by it and determined in its favor by the above entitled court on the 31st of March, 1924.

V

The court erred in failing to hold that plaintiff's suit is prematurely brought and that the injunction prayed for by plaintiff should for this reason be denied.

VI

The court erred in passing an injunction order as against the defendant, Walter M. Pierce, as Governor of Oregon.

VII

The court erred in passing an injunction order as against the defendant, Isaac H. Van Winkle, as Attorney General of Oregon.

VIII

The court erred in passing an injunction order against the defendant, Stanley Myers, as District Attorney for Multnomah County, Oregon.

IX

The court erred in passing an injunctive order which fails to specify the acts on the part of defendants which are enjoined.

X

The court erred in passing an injunctive order vague and uncertain as to the acts undertaken to be restrained and enjoined.

XI

The court erred in holding that the statute so adopted under the initiative on the 7th day of November, 1922, and set forth at large in the seventh paragraph of the amended bill of complaint which statute is also published as chapter one of the General Laws of Oregon for the year 1923 in the official compilation of the said laws, is in conflict with the Constitution of the United States and particularly with the Fourteenth Amendment thereto.

POINTS AND AUTHORITIES

I

The fourteenth amendment does not remove or restrict the power of the states to enact laws necessary to promote the health, safety, peace, morals, education or general welfare of its people.

Munn v. People of Illinois, 94 U. S. 278, S. C. Rep. 113-154, 24 L. Ed. 77, 83;

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989, 992;

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357;

Mugler v. Kansas, 123 U. S. 623, 666, 31 L. Ed. 205, 212, 8 Sup. Ct. Rep. 273;

Powell v. Pennsylvania, 127 U. S. 678, 8 S. C. R. 992, 32 L. Ed. 253, 255, 257;

Re Kemmler, 136 U. S. 436, 449, 34 L. Ed. 519, 524, 10 Sup. Ct. Rep. 930;

Crowley v. Christensen, 137 U. S. 86, 34 L. Ed. 620, 623;

Jones v. Brim, 165 U. S. 180, 182, 41 L. Ed. 677, 678, 17 Sup. Ct. Rep. 282;

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 649, 651, 652;

Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. Ed. 111, 115;

McLean v. Arkansas, 211 U. S. 539, 53 L. Ed. 315, 319, 320;

Middleton v. Texas Power & L. Co., 249 U. S. 152, 63 L. Ed. 527, 531;

N. O. Gas Light Co. v. Louisiana Light, etc., Mfg Co., 115 U. S. 650, 29 L. Ed. 516, 520;

Slaughter House Cases, 16 Wall. 22, 21 L. Ed. 394, 404-410;

Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, 1080;

Sanitary District of Chicago v. United States, Advance Opinion No. 161, October Term, 1924, January 5, 1925.

II

The provisions of a corporation charter and of any law pursuant to which a corporation may have entered into valid contracts, are subject to modification and annulment under the police power.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989, 992;
Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, 1080;
The Mayor, etc., of the City of New York v. Miln, 11 Peters 102, 9 L. Ed. 648, 660;
Eagle Insurance Co. v. State of Ohio, 153 U. S. 449, 38 L. Ed. 778, 780;
Chicago B. & Q. Co. v. State of Nebraska ex rel. Omaha, 170 U. S. 59, 52 L. Ed. 948, 953;
Pacific Gas & E. Co. v. Police Court, 251 U. S. 22, 64 L. Ed. 112, 117;
Thornton v. Duffy, 254 U. S. 361, 65 L. Ed. 304, 309;
Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. Ed. 1084, 1087.

III

As to minors, the state stands in the position of parens patriae and may exercise unlimited supervision and control over their contracts, occupation and conduct and the liberty and right of those who assume to deal with them.

State v. Shorey, 48 Or. 396, 398;
Stettler v. O'Hara, 69 Or. 519;
State v. Bunting, 71 Or. 259;
Gibbons v. Gibbons, 75 Or. 500, 503;
Merges v. Merges, 94 Or. 246, 252;
State v. Bailey, 157 Ind. 324, 59 L. R. A. 435, 537;
Sturges & Burn Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. Ed. 245, 249;

Muller v. Oregon, 208 U. S. 412, 52 L. Ed. 551, 555;
Starnes v. Albion Mfg. Co., 147 N. C. 566, 61 S. E. 525, 17 L. R. A. (N. S.) 602, and notes, 15 Ann. Cas. 470, and notes;
People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794;
Berea College v. Commonwealth, 123 Ky. 209, 94 S. W. 623, 13 Ann. Cas. 337;
State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739;
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Meyer v. Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 1045, 1046;
Schouler on Domestic Relations, 5th Ed., Sec. 235, 20 R. C. L. 597;
In re Turner, 49 Kan. 115, 145 Pac. 871, Ann. Cas. 1916E, 1022, 1024;
Vanwalters v. Board of Children's Guardians, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431, 432;
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Egoff v. Board of Children's Guardians, 170 Ind. 238, 84 N. E. 151, 155;
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Interstate Company v. Massachusetts, 207 U. S. 79, 52 L. Ed. 111, 115, 12 Ann. Cas. 555, 557.

IV

The statute does not interfere with the religious liberty of any one.

Permoli v. New Orleans, 3 How. 589, 609, 11 L. Ed. 739, 748;
Brunswick Co. v. Evans, 228 Fed. 991;
People v. Board of Education, 245 Ill. 335, 19 Ann. Cas. 220, 29 L. R. A. (N. S.) 442, 92 N. E. 251;
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Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244, 250;
Commonwealth v. Herr, 229 Pa. St. 132, 78 Atl. 68, 71-72;
Owens v. State, 6 Okla. Cr. 110, 36 L. R. A. (N. S.) 633, 634-636;
People v. Pierson, 176 N. Y. 201, 63 L. R. A. 187, 192, 68 N. E. 243;
Scales v. State, 47 Ark. 476, 58 Am. Rep. 768, 1 S. W. 769, 771;
Commonwealth v. Has, 122 Mass. 40, 42;
Philips v. Gratz, 2 Pen. & W. 412, 23 Am. Dec. 33;
Wilkes-Barre v. Garabed, 11 Pa. Super. 355;
Smith v. People, 51 Colo. 270, 36 L. R. A. (N. S.) 158, 161.

V

The American people as a whole have unalterably determined that there shall be an absolute and unequivocal separation of church and state, and that the public schools shall be maintained and conducted free from influences in favor of any religious organization, sect, creed or belief.

Article I, Constitution of United States;
Article I, section 5, Oregon Constitution;
Article VIII, section 3, Oregon Constitution;
Knowlton v. Baumhover, 182 Iowa 691, 166 N. W. 202, 5 A. L. R. 841, 848, 849, 850, 851, 856;

Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334, and notes;
Evans v. Selma Union High School District (Cal., 1924), 222 Pac. 801, 31 A. L. R. 1121;
Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256, 272, 273, 274, 275.

VI

The provisions of subdivision "d" of the act conferring upon county superintendents power to determine whether or not a child is being properly taught, and to order such as are not to be sent to public schools, do not invalidate the measure, but relate to a proper exercise of administrative power.

State v. Briggs, 45 Or. 366, 375-376;
Field v. Clark, 143 U. S. 649, 36 L. Ed. 294, 310;
Lee v. Hoffman, 182 Iowa 1216, 1220, 1221, 1226, 1227, 166 N. W. 565;
State v. Yopp, 97 N. C. 477, 2 S. E. 458;
Fischer v. St. Louis, 194 U. S. 361, 48 L. Ed. 1018, 1023;
Ex parte Fiske, 72 Cal. 125, 13 Pac. 310;
Ex parte Spencer, 149 Cal. 396, 86 Pac. 896, 898;
Ex parte Weber, 149 Cal. 392, 86 Pac. 809;
City of Eureka v. Wilson, 15 Utah 53, 48 Pac. 41, 44;
State v. Wolf, 145 N. C. 440, 59 S. E. 40.

VII

The fact that the amendment to section 5259, Oregon Laws, contains new provisions in conflict with a succeeding section of the act, which was not amended, does not invalidate the amendment.

Section 20, Article IV, Constitution of Oregon;
Cooley's Constitutional Limitations (7th Ed.), pages 246-247;

Gantenbein v. West, 74 Or. 334;
Kiernan v. Portland, 57 Or. 454, 463;
Peterson v. Lewis, 78 Or. 641;
Southern Pacific Co. v. Campbell, 189 Fed. 696;
Hirschfield v. McCullagh, 64 Or. 502;
Ex parte Case, 70 Or. 291;
Simon v. Northup, 27 Or. 487, 503-506;
Fisher v. McGirr, 1 Gray 1;
Commonwealth v. Clapp, 5 Gray 97, 100;
In re Groff, 21 Neb. 647, 33 N. W. 426;
Donnersberger v. Prendergast, 128 Ill. 229, 21 N. E. 1, 2;
Rood v. Cargar, 49 Cal. 117;
State v. Phenline, 16 Or. 107, 109;
Ex parte Howe, 26 Or. 181, 184;
Murphy v. Salem, 49 Or. 54, 58;
Lewis' Sutherland Statutory Construction (2d Ed.), Vol. 1, p. 236, section 139;
Newman v. State, 101 Ga. 534, 28 S. E. 1005;
State v. Am. Sugar Ref. Co., 106 La. 553, 31 So. 181;
Horkey v. Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. St. Rep. 623.

ARGUMENT

The statute involved in this proceeding is intended to compel all children between the ages of eight and sixteen years to attend public schools, with certain exceptions not material to this case. It applies to parents, guardians or other persons having control or charge or custody of such children, and provides a penalty.

It is not contended that appellee is directly affected in the sense that it could be punished for violation of the statute. Its claim of right to institute this suit is based upon property damage which it alleges will result to it from the enforcement of the law and is now being sustained by it by reason of threats on the part of the appellants to enforce the law.

It might be urged that under such circumstances the appellee cannot invoke the aid of this court to protect it from incidental injury and damages that may result from the enforcement or threatened enforcement of the law.

Rosenthal v. New York, 226 U. S. 260, 271, 57 L. Ed. 212, 217, Ann. Cas. 1914B, 71, 74;

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. Ed. 364, 368;

Arkadelphia Mill Co. v. St. Louis Co., 249 U. S. 134, 149, 63 L. Ed. 517, 526;

Middletown v. Texas Power Co., 249 U. S. 152, 157, 63 L. Ed. 527, 531;

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 65 L. Ed. 165, 170;

Marye v. Parsons, 114 U. S. 325, 29 L. Ed. 205, 206;

Hagood v. Southern, 117 U. S. 52, 29 L. Ed. 805;

Ex parte Ayres, 123 U. S. 443, 31 L. Ed. 216, 226;

McCabe v. Atchison Ry., 235 U. S. 151, 162, 59 L. Ed. 169, 174;

Business Men's League v. Waddill, 143 Mo. 495, 45 S. W. 262, 40 L. R. A. 501;

Clark v. Kansas City, 176 U. S. 114, 20 Sup. Ct. Rep. 284, 44 L. Ed. 392, 396;

Hooker v. Burr, 194 U. S. 415, 48 L. Ed. 1046, 1050;
Cram v. Chicago, etc., R. Co., 85 Neb. 586, 19 Ann. Cas. 170;
Hampton v. St. Louis Co., 227 U. S. 456, 469, 57 L. Ed. 596, 600;
City of Lampasas v. Bell, 180 U. S. 276, 283, 45 L. Ed. 527, 530;
Chadwick v. Kelly, 187 U. S. 540, 546, 47 L. Ed. 293, 295;
Cronin v. Adams, 192 U. S. 108, 114, 48 L. Ed. 365, 368;
New York v. Reardon, 204 U. S. 152, 160, 51 L. Ed. 415, 422;
Southern Ry. v. King, 217 U. S. 524, 534, 54 L. Ed. 868, 872;
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. Ed. 713, 719;
Lee v. New Jersey, 207 U. S. 67, 70, 52 L. Ed. 106, 107;
Oliver Iron Co. v. Lord, 262 U. S. 172, 43 Sup. Ct. Rep. 526, 67 L. Ed. 929.

However, it will be to the manifest interest of all persons concerned if the court will disregard all technical questions involving delay and proceed to the determination of the constitutional question. With that end in view, argument upon any question regarding the incapacity of appellee to bring this suit and whether or not the suit is premature is waived.

Point No. I

It was early announced by this court that it is "easier to determine whether particular cases come within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate".

Stone v. Mississippi, 16 Wall. 62, 25 L. Ed. 1079, 1080;

N. O. Gas Light Co. v. Louisiana Light, etc., Mfg. Co., 115 U. S. 650, 29 L. Ed. 516, 520.

So many different conditions and circumstances have required consideration that this appellant will presume to take time and space necessary for a brief resume of the principles announced by the court in some of the leading cases.

In *Munn v. People of Illinois*, 94 U. S. 278, 24 L. Ed. 77, 83, the court, by Mr. Chief Justice Waite, in discussing the scope of the fourteenth amendment, said:

> "When one becomes a member of society, he necessarily parts with some rights or privileges, which, as an individual not affected by his relations to others, he may retain. 'A body politic,' as amply defined in the preamble of the constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good'."

In *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, 992, this court, by Mr. Justice Bradley, said:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory defini-

tion of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the provision of good order and the public morals."

In *Mugler v. Kansas*, 123 U. S. 562, 31 L. Ed. 205, 210, the court, by Mr. Justice Harlan, said:

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetities or passions, may be willing to imperil the peace and security of the many provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

In *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253, 257, the court, by Mr. Justice Harlan, said:

"* * * The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of

this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government.

"It is argued, in behalf of the defendant, that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between coordinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the constitution and the statue is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land."

In *Jacobson v. Massachusetts,* 197 U. S. 11, 49 L. Ed. 643, 651, the court, by Mr. Justice Harlan, said:

"* * * We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best known, way to which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler v. Kansas,* 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber,* 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas,* 191 U. S. 207, 223, 48 L. Ed. 148, 158, 24 Sup. Ct. Rep. 124."

In *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 52 L. Ed. 111, this court, by Mr. Justice Holmes, said (page 115, L. Ed.):

"If the fourteenth amendment is not to be a greater hamper upon the established practices of the states in common with other governments that I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed.

"Education is one of the purposes for which what is called the police power may be exercised. *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357. Massachusetts always has recognized it as one of the first objects of public care. * * *"

In *McLean v. Arkansas*, 211 U. S. 539, 53 L. Ed. 315, 319, this court, by Mr. Justice Day, said:

"The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts, supra, Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148, 158, 24 Sup. Ct. Rep. 124.

"If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

In *Middleton v. Texas Power & L. Co.*, 249 U. S. 152, 63 L. Ed. 527, 531, this court by Mr. Justice Pitney, said:

> "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. *Rosenthal v. New York*, 226, U. S. 260, 271, 57 L. Ed. 212, 217, 33 Sup. Ct. Rep. 27. Ann. Cas. 1914B, 71; *Patsone v. Pennsylvania*, 232 U. S. 138, 144, 58 L. Ed. 539, 543, 34 Sup. Ct. Rep. 281; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 649, 650, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678; *International Harvester Co. v. Missouri*, 234 U. S. 199, 215, 58 L. Ed. 1276, 1283, 52 L. R. A. (N. S.) 525, 34 Sup. Ct. Rep. 859; *Koekee Consol. Coke Co. v. Taylor*, 234 U. S. 224, 227, 58 L. Ed. 1288, 34 Sup. Ct. Rep. 856; *Miller v. Wilson*, 236 U. S. 373, 384, 59 L. Ed. 628, 632, L. R. A. 1915F, 829, 35 Sup. Ct. Rep. 342.
>
> "The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. * * *"

Point No. II

The third ground of illegality alleged in paragraph fifteen of appellee's amended complaint reads as follows:

> "3. That said pretended law attempts to impair the obligation of the contract between the State of Oregon and the plaintiff arising out of the aforesaid corporation laws of said state and the incorporation of the plaintiff thereunder, in violation of section 10 of article I of the Constitution of the United States, and of section 21 of article I of the Constitution of the State of Oregon."

In answer to that objection, citations from a few of the cases in which it has been considered by this court follow.

Boston Beer Co. v. Massachusetts, 97 U. S. 25; 24 L. Ed. 989, 992:

> "* * * The plaintiff in error boldly takes the ground, that, being a corporation it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.
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> * * * * * * *
>
> "The legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, solus populi suprema lex; and they are to be attended and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama* (Ante. 302)."

Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, 1080:

"All agree that the legislature can not bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.' *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y., 657; *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. * * *"

Thornton v. Duffy, 254 U. S., 361, 65 L. Ed., 304, 309:

"We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the Constitution of the state, as much a part of both as if expressed in them (*Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968), and we are unable to yield to the contention that the legislation or the requirement transcends the power of the state, or in any way violates the Constitution of the United States. The law expressed the constitutional and legislative policy of the state to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employe, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions. There was an attempt at the accommodation of the new policy to old conditions in the concession to employers to deal directly with their

employes, but there was precaution against failure in the provision of section 22, giving discretion to the commission to withdraw the concession. After a few years' experience, that discretion was turned into a duty, and by the amendment of March 20, 1917, the concession was taken away from those employers who indemnified themselves by insurance. This was considered necessary to execute the policy of the state, and we are unable to yield to the contention that property rights or contract rights had accrued against it. To assert that the first steps of a policy make it immutable is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new, and we have heretofore been invoked to pronounce judgment upon it. Complying, we said that an exercise of public policy can not be resisted because of conduct or contracts done or made upon the faith of former exercises of it, upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & N. R. Co. v. Mottley,* 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265."

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. Ed. 1084, 1087:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired if that company be held subject to the operation of subsequent statutes, regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain or prohibit insurance companies incorporated in Illinois from further continuance in business. This position can not be sustained, consistently with the power which the State has, and upon every ground of public policy must always have, over corporations of her own creation.

Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they may be withdrawn or reclaimed by the State, in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett v. Taylor*, 9 Cranch, 51; Ang. & Ames, Corp. (9th ed.), sec. 774, note."

Point No. III

The inherent right of parents to the custody and control of their minor children is recognized and protected in every civilized nation. No more intimate relation exists in human society, and the life and welfare of such children are so dependent upon the protection and care of the parents as to afford no basis for argument regarding the nature of the parents' rights. It is equally well established that in matters relating to the general welfare of such children and of the public the rights of the parents are subject to the paramount right of the state to exercise control over such minors. This is well illustrated by the decisions of this court and numerous decisions of other federal courts, and of state courts, relating to the hours and places of employment of minors, compulsory vaccination, compulsory school laws, the custody of the children of divorced parents and of those who are incompetent mentally, morally or otherwise, to afford them such care and protection as the state may deem proper and necessary.

The only limitation upon such power on the part of the state is that it shall be exercised for a reasonable purpose and bear some reasonable and necessary relation to the health, morals or welfare of the child and of the state.

The superior right of the state to prescribe qualifications of teachers, uniform text books, courses of study, and other things which affect the personal rights and interests of pupils and parents is well established.

Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256 272, 273, 274, 275;
O'Connor v. Hendrick, 184 N. Y. 421, 77 N. E. 712, 7 L. R. A. (N. S.) 402.

RECOGNIZED CONTROL OF EDUCATION

In accordance with the foregoing principles, we are accustomed in this country to recognize the control by the state of the education of children.

Berea College v. Commonwealth, 123 Ky. 209, 94 S. W. 623, 13 Ann. Cas. 337.

In this case the Kentucky court upheld the validity of a statute requiring the segregation of the white and the colored races in the schools.

It is also well settled that the state in the exercise of the police power may require the compulsory education of children. Our research discloses the significant circumstance that there are but few cases in which this principle has been decided. The reason doubtless is that the American people with almost entire unanimity have acquiesced in the enactment and enforcement of compulsory education laws. Such authorities as there are bearing on the question speak with entire unanimity and

the principle on which some of them are decided is broad enough to uphold the constitutionality of the statute now in question.

There is much significance in the fact that every state in the Union has a statute providing for the compulsory education of children. In five of the states the statutes resemble the Oregon statute in that attendance at a private school is not of itself a compliance with the statutory requirements. See

General Statutes of Connecticut of 1918, vol. 1, sec. 835, 839.

Laws of Maryland, 1916, c. 506, sub-chapter 21, sec. 162.

Birdseye, Cumming & Gilbert's Consolidated Laws of New York, 2d Ed. vol. 2, article 23, sec. 623.

Laws of Nevada, 1920-1921, c. 157, sec. 1, amending sec. 203 of the Act of March 20, 1911.

General Laws of Vermont, 1917, sec. 1254.

35 Cyc. 1122.

"A compulsory education law is not unconstitutional as an invasion of the natural right of a parent to govern and control his own children, as it is competent for the legislature to compel parents to perform the natural duty of education owed to their children."

State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. R. A. 739.

This case involved the validity of the compulsory school law of New Hampshire, for a violation of which the defendant had been convicted. We quote from the opinion of the court:

"The motion to quash the complaint on the ground that the statute upon which it was founded is unconstitutional was properly denied. The statute is as follows:

'Every person having the custody and control of a child between the ages of eight and fourteen years, residing in a school district in which a public school is annually taught, shall cause such child to attend the public school all the time such school is in session, unless the child shall be excused by the school board of the district because his physical or mental condition is such as to prevent his attendance for the period required, or because he was instructed in the English language in a private school approved by the school board, for a number of weeks equal to that in which the public school was in session, in the common English branches, or, having acquired those branches, in other more advanced studies. Any person who does not comply with the requirements of this section shall be fined $10 for the first offense, and $20 for every subsequent offense.' Pub. Stat. chap. 93, sec. 14; Laws 1901, chap, 61, sec. 1. That education of the citizen is essential to the stability of the state is a proposition too plain for discussion. As a mere generalization of our own, it would command immediate and universal assent. But it rests upon a firmer foundation. The constitution declares that 'knowledge and learning, generally diffused through a community' are essential to the preservation of a free government. Const. Art. 82. * * *

"Being without brief or argument from the defendant, we are not advised upon what ground he asserts the unconstitutionality of the act. Certainly, it is not unconstitutional, merely because, in obedience to the mandate of the constitution, and for 'the preservation of a free government,' it interferes in some measure with the natural right of parental dominion. 'When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others' (Bill of Rights, Art. 3), and subject themselves to innumerable restrictions and regulations for the common good."

The court then proceeds to construe the statute as impliedly permitting a parent to keep a child out of school when the child's health required such absence. The court then proceeds to say:

> "One whose child is stricken by some malady, making detention from school reasonably necessary in defense of the child's life, breaks no law of this jurisdiction by hastening for doctors and nurses instead of to the board of education. On the other hand, if he keeps his child from school merely to suit his own or his child's pleasure, or for any other reason not within the exceptions provided by the act or guaranteed by the constitution, he must suffer the penalty. Indeed, as thus limited, the law is a decided invasion of the parental domain; but, being repugnant to no provision of the constitution, and being for 'the benefit and welfare of this state, and for the governing and ordering thereof,' the citizen, in fulfillment of the social compact, must yield submission and obedience. *School Board v. Jackson*, L. R. 7 Q. B. Div. 502; *Burdick v. Babcock*, 31 Iowa, 562, 568-571; *Donahoe v Richards*, 38 Me. 379, 391, 395-397, 61 Am. Dec. 256; Schouler, Dom. Rel. 235."

It is true that the question mooted in the above case was whether or not the court could read into the statute the implication that a sick child was excused from attendance at school. The case nevertheless involved the validity of the New Hampshire statute and the court of necessity held the statute valid and applicable. The statute by its terms applied to all of the children in the state except those who were excused by the school board. There was no requirement in the statute that the school board should excuse any child and the statute therefore was on all fours with the Oregon statute in requiring attendance at the public schools.

Commonwealth v. *Roberts*, 159 Mass. 372, 34 N. E. 402.

The Massachusetts compulsory education law contained the following provisions:

> "* * * But, if such child has attended for a like period of time a private day school approved by the school committee of such city or town, or if such child has been otherwise instructed for a like period of time in the branches of learning required by law to be taught in the public schools, * * * such penalties shall not be incurred."

The defendant was charged with failure to send his child to the public school in accordance with the requirements of the statute. He offered to show that the child had been instructed in the branches of learning required by law to be taught in the public schools in a private day school not approved by the school committee, application for such approval having been made and refused. The court refused to admit the testimony and the defendant was convicted. In construing the statute the Massachusetts court said:

> "Sending a child to a private day school approved by the school committee is enough to comply with the requirement of the law without further inquiry. Pub. St. c. 47, sec. 2, prescribes what private day schools may be so approved. But if the person having a child under his control, instead of sending him to a public school, or to a private day school approved by the school committee, prefers to have him instructed otherwise, it will be incumbent on him to show that the child has been instructed for the specified period in the required branches of learning, unless the child has already acquired them. This permits instruction in those branches in schools or academies situated in the same city or town or elsewhere, or instruction by a private tutor or governess, or by the parents themselves, provided it is given in good faith, and is sufficient in extent.

> If the school committee has not approved of a particular school, or has expressly refused to approve of it, then the person having control of a child, if he sends the child to that school, must take the responsibility of being able to prove that he has been sufficiently and properly instructed there. He has no such responsibility if he sends the child to a private day school approved by the school committee. The evidence which was excluded should have been admitted. Verdict set aside."

State v. Counort, 69 Wash. 321, 124 Pac. 910, 41 L. R. A. (N. S.) 95.

This case upholds the validity of the compulsory education statute of the state of Washington. The case holds that a father cannot defend a criminal prosecution by showing that he is qualified to teach his daughters and was in fact conducting a school for them in his home at the time when he was charged with failing to send them to the public school.

Meyer v. Nebraska, 262 U. S. 390; 67 L. Ed. 1042, 1046.

The opinion of Mr. Justice McReynolds in the above case, handed down on the 4th of June, 1923, contains the following sentence:

> "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned."

A common school education is a benefit to any child. It is competent for the state to go beyond the established doctrine of assuring to a parent the right to educate his children in a public school. The state is well within its constitutional powers in assuring to every child an education in the public schools.

The textbooks recognize the validity of compulsory education statutes.

In *State v. Shorey*, 48 Or. 396, 398, the constitutionality of laws prohibiting the employment of children under 16 years of age before the hour of seven in the morning or after the hour of six at night, or for longer than ten hours in any one day, or more than six days in any one week, was involved. The court, by Mr. Justice Bean, in referring to the effect of the fourteenth amendment of the Constitution of the United States upon the said statute, said:

> "These constitutional provisions do not limit the power of the state to interfere with the parental control of minors, or to regulate the right of a minor to contract, or of others to contract with him; 2 Tiedeman, State & Fed. Con. sec. 195. It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, or of life or limb. Such legislation is not an unlawful interference with the parents' control over the child or right to its labor, nor with the liberty of the child; *People v. Ewer*, 141 N. Y. 129 (36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788), affirming *In re Ewer*, 70 Hun, 239, (24 N. Y. Supp. 500).
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> "2. Laws prohibiting the employment of adult males for more than a stated number of hours per day or week are not valid unless reasonably necessary to protect the public health, safety, morals or general welfare, because the right to labor or employ labor on such terms as may be agreed upon is a liberty or property right guaranteed to such persons by the Fourteenth Amendment to the Constitution of the United States and with which the state can not interfere: *Lochner v. New York*, 198 U. S. 45 (25 Sup. Ct. 539, 49 L. Ed. 937). But laws regulating the right of minors to contract do not come within this principle. They are not sui juris and can only contract to a limited extent. They are wards of the state and subject to its control. As to them, the state stands in the

position of parens patriae, and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health and morals of its future citizens. * * *"

In *Stettler v. O'Hara*, 69 Or. 519, 532, it is said:

"When new conditions arise which injuriously affect the health or morals or welfare of the public, we no longer say that we will expand the police power to reach and remedy the evil. Instead, we say that a new evil has arisen which an old principle of government—the police power—will correct."

In *Gibbons v. Gibbons*, 75 Or. 500, 503, a suit involving the custody and support of minor children of divorced parents, the court said:

"1. Minor children of divorced parties remain the wards of the court which dissolved the bonds of matrimony, and, as such children were not parties to the suit, they are not bound by any decree as to the source or extent of their maintenance: *McFarlane v. McFarlane*, 43 Or. 477, 484 (75 Pac. 139). The welfare of these infants is paramount to the rights of any other person, and their support and education should be borne equally by their parents if they are able, but, if not, then by the father or mother who is financially responsible. The court granting the decree of divorce is authorized to modify it at any time so as to provide for the care, custody and support of the minors, and may impose such burden upon either or both parties to the suit: (Section 514, L. O. L.)"

In *Merges v. Merges*, 94 Or. 246, 252, it is said:

"Primarily, therefore, under our statute, the parents have equal rights to the custody of their children. Where this is in dispute it is universally conceded that

the controlling consideration, paramount above all others, is the welfare of the child. It is not a chattel like pigs, chickens or furniture, to be divided between the divorce litigants on the basis of monetary value; neither is its custody to be made the vehicle for a continuation of their antagonisms and resentments toward each other. It is a matter of almost tragic regret that parents should break up their home by their bickerings and deprive their child of that nurture and admonition that congenial parents can give. But such things happen, and out of the wreck the courts must do the best possible under the circumstances for the welfare of the offspring. The preferences of the parents, whether founded in spite or in real affection, must yield to the best interests of the child. The authorities are practically unanimous on this subject. The principle is conceded in the argument and it is not necessary to note precedents in support of this conclusion."

State v. Bailey, 157 Ind. 324, 59 L. R. A. 435, involved a question of the validity of a compulsory education law which was assailed upon the ground that it invaded the natural right of a man to govern and control his own children. At page 437 of the report in L. R. A. the court said:

"The next question presented is whether the statute is an unauthorized invasion of the natural rights of the appellee as a parent. The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and regulated by municipal laws. One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes, not to the child only, but to the commonwealth. If he neglects to perform it, or wilfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to

the child the opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods during certain years of the life of such children have not only been upheld as strictly within the constitutional power of the legislature, but have generally been regarded as necessary to carry out the express purposes of the Constitution itself. Ind. Const. art. 8, secs. 1-8; *Hochheimer, Custody of Infants*, sec. 79; Fraser, Parent & Child, 77; *Bennet v. Bennet*, 13 N. J. Eq. 114; *English v. English*, 32 N. J. Eq. 738; *Re Bort*, 25 Kan. 308, 37 Am. Rep. 255; *People v. Ewer*, 141 N. Y. 129, 25 L. R. A. 794, 36 N. E. 4; *Sheers v. Stein*, 75 Wis. 44, 5 L. R. A. 781, 43 N. W. 728; *Lally v. Fitz Henry*, 85 Iowa, 49, 16 L. R. A. 681, 51 N. W. 1155. 'The matter of education is deemed a legitimate function of the state, and, with us, is imposed upon the legislature as a duty by imperative provisions of the Constitution. . . . The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment, and to do so would be to invade the province which by the constitution is assigned exclusively to the lawmaking power.' *State v. Clottu*, 33 Ind. 409, 411. To carry out the enlightened and comprehensive system of education enjoined by the Constitution of this state, a vast fund, dedicated exclusively to this purpose, has been set apart. Revenues to the amount of more than $2,000,000 annually are distributed among the school corporations of the state. No parent can be said to have the right to deprive his child of the advantages so provided, and to defeat the purposes of such munificent appropriations."

In *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, the constitutionality of a statute prohibiting the employment or exhibition of girls under 14 years of age as dancers or in theatrical exhibitions was involved. The court, by Mr. Justice Gray, said (page 797 in 25 L. R. A.):

> "The proposition is indisputable that the custody of the child by the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child, and as its natural guardian, is held to the performance of certain duties. To society, organized as a state, it is a matter of paramount interest that the child shall be cared for, and that the duties of support and education be performed by the parent or guardian, in order that the child shall become a healthful and useful member of the community. It has been well remarked that the better organized and trained the race the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment; and which limit and regulate the employment of children in the factory and the workshop to prevent injury from excessive labor. It is not, and can not be disputed, that the interest which the state has in the physical, moral, and intellectual well-being of its members warrants the implication and the exercise of every just power which will result in preparing the child in future life to support itself, to serve the state, and in all the relations and duties of adult life to perform well and capably its part."

Point No. IV

The statute in nowise interferes with the custody of children. No parent who is now entitled to the custody of his children will lose such custody under the operations of this statute. The statute in nowise prevents a parent from instructing his children in any subject what-

soever. It has no direct reference or application to the operation of appellee's school. Appellee may still operate its school. During the entire school day it may instruct children under eight years of age and over 16 years of age. It may board children between these ages and, after they have attended public school during the hours at which such attendance is compulsory, appellee may exercise its control over these children in any proper way. They may receive such religious instruction as their parent, guardian or custodian may elect. Nothing in the statute purports to interfere with the religious convictions either of parents or of children.

The statute, we submit, is clearly valid within the principles announced in the foregoing authorities.

RELIGIOUS LIBERTY

The federal constitution does not guarantee religious liberty to the citizens of the several states. It merely prohibits the enactment by Congress of any law establishing a religion or prohibiting the free exercise thereof. A contention that a state statute violates the religious liberty of a citizen does not therefore raise a federal question.

Permoli v. New Orleans, 3 How. 589, 609, 11 L. Ed. 739, 748.
Brunswick Co. v. Evans, 228 Fed. 991.
People v. Board of Education, 245 Ill. 335, 19 Ann. Cas. 220, 29 L. R. A. (N. S.) 442, 92 N. E. 251.
Swafford v. Keaton, 23 Ga. App. 238, 98 S. E. 122.
State v. Mockus, 113 Atl. 39, 44 (Me.).

The books are full of cases in which the contention has been advanced that the religious convictions of a party have required him to break the law, and the conclusion has been advanced upon these premises that the laws in question are unconstitutional. The courts have everywhere refused to uphold this contention. Perhaps the leading case on the subject is

Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244, 250.

This case involved the constitutionality of the Edmunds act prohibiting polygamy. The defendant was a Mormon who professed belief that it was his religious duty to live polygamously, but the court refused to uphold this defense. We quote from the opinion:

> "In our opinion the statute immediately under consideration is within the legislative power of congress. It is constitutional and valid as prescribing a rule of action for all those residing in the territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they can not interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed that it was her duty to burn herself upon the funeral pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

"So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

RELIGIOUS GARB

The courts have also upheld as constitutional statutes forbidding the use of a religious garb in the schools. The defense of religious conviction has been asserted to restrain the enforcement of these statutes. The best decision bearing on this subject which we have found is *Commonweath* v. *Herr*, 229 Pa. St. 132, 78 Atl. 68, 71-72.

"We can not assent to the proposition that the intent or effect of the legislation is to disqualify any person from employment as a teacher 'on account of his religious sentiments.' It is directed against acts, not beliefs, and only against acts of the teacher whilst engaged in the performance of his or her duties as such teacher. It is true the acts prohibited are those which may indicate, and indeed may be dictated by, the religious sentiments of the teacher. Therefore, we are led to the broader inquiry whether this constitutes an infringement of the 'natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences,' or contravenes the accompanying declaration that 'no human authority can, in any case whatever, control or interfere with the rights of conscience.' No man's religious belief may be interfered with by law. * * *

"But broad as are these declarations of our constitution, and sacred as are the religious freedom and the rights of conscience they secure, yet it must be apparent

to any person upon reflection, and has been repeatedly declared by the highest judicial authority, that they do not mean unqualifiedly that it is beyond the power of the legislature to enact any law which will restrain individuals from doing that which, if it were not for the law, their consciences would teach them to be their moral or religious duty. Indeed, it is impossible to see how civil government could exist, if the dictates of the individual conscience were in every instance where they come in conflict with the law of the land the paramount rule of action. * * *

"For example, not to go outside of Pennsylvania, a Jew who refused to be sworn in the trial of a case on Saturday because it was his Sabbath was fined, *Stanbury v. Marks*, 2 Dall. 213 (I L. Ed. 353). The conscientious scruples of a Jew to appear in court and attend to the trial of his case on the same day were held to be no ground for the continuance of his cause. *Philips v. Gratz*, 2 Pen. & W. 412 (23 Am. Dec. 33). The act prohibiting all worldly employment upon the first day of the week has been held not to be in contravention of the constitutional rights under consideration, even where applied to persons whose religious belief leads them to observe another day of the week as their Sabbath. *Commonwealth v. Wolf*, 3 Serg. & R. 48; *Specht v. Commonwealth*, 8 Pa. 312 (49 Am. Dec. 518). The same was held to be true as to persons who conscientiously believe it to be their religious duty to labor the first six days of the week and to keep the seventh day as the Sabbath. *Waldo v. Commonwealth*, 9 Weekly Notes Cas. 200. Adherents of a religious organization who deem it their duty by divine command to go into the streets and there preach the gospel and who as a regular part of their service use the drum are not exempted by the constitution from the operation of a city ordinance which prohibits the use of a drum or other musical instrument on the street without permit from the mayor. *Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 355. The case of *Commonwealth v. Lesher*, 17 Serg.

& R. 155, is not directly pertinent to the question before us, but the remarks of Chief Justice Gibson which though made in a dissenting opinion were approved in *Specht v. Commonwealth*, 8 Pa. 312, and have not been questioned or qualified in any later case that has come to our notice, seem to be very pertinent. He said: 'It is declared in the constitution that no human authority can, in any case, control or interfere with the rights of conscience. But what are those rights? Simply a right to worship the Supreme Being according to the dictates of the heart, to adopt any creed or hold any opinion whatever on the subject of religion, and to do or forbear to do, any act, for conscience sake, the doing or forbearing of which is not prejudicial to the common weal.' Then after speaking of the views of Mr. Jefferson upon the subject, he proceeded: 'He denies the right of society to interfere only where society is not a party in interest, the question, with its consequences, being between the man and his Creator; but, as far as the interests of society are involved, its right to interfere on principles of self-preservation is not disputed. And this right is insolvable into the most absolute necessity; for, were the laws dispensed with, wherever they happened to be in collision with some supposed religious obligation, government would be perpetually falling short of the exigence. There are few things, however simple, that stand indifferent in the view of all the sects into which the Christian world is divided.' The right of the individual to clothe himself in whatever garb his taste, his inclination, the tenets of his sect, or even his religious sentiments may dictate is no more absolute than his right to give utterance to his sentiments, religious or otherwise."

To the same effect:

O'Connor v. Hendricks, 184 N. Y. 421, 77 N. E. 712, 7 L. R. A. (N. S.) 402.

MEDICAL ATTENDANCE

It is also held that the religious belief of the parent is no defense in a prosecution for a failure to provide a child with the medical attendance required by a statute or an ordinance.

Owens v. State, 6 Okla. Cr. 110, 36 L. R. A. (N. S.) 633, 634-636.
People v. Pierson, 176 N. Y. 201, 63 L. R. A. 187, 192, 68 N. E. 243.

SUNDAY LAWS

The Jew and the Seventh-Day Adventist have contended that because of their religious beliefs they are without the operation of the Sunday laws, but the courts have refused to recognize this defense.

Scales v. State, 47 Ark. 476, 58 Am. Rep. 768, 1 S. W. 769, 771.
Commonwealth v. Has, 122 Mass. 40, 42.
Philips v. Gratz, 2 Pen. & W. 412, 23 Am. Dec. 33.

SALVATION ARMY

One of the very best cases to be found in the books declaring the law on this subject is *Wilkes-Barre v. Garabed*, 11 Pa. Super. 355. The defendant was an officer in the Salvation Army who was fined for violating an ordinance forbidding the beating of a drum on the streets of a city. He contended that his act was an act of worship and that the ordinance in question as applied to an officer of the Salvation Army engaged in conducting its characteristic service on the streets was a violation of the freedom of worship guaranteed by the constitution of Pennsylvania. The case was thoroughly briefed and the opinion of Judge Orlady, beginning on page 365 of the report, exhaustively discusses the law.

HEALING BY PRAYER

Another excellent case is that of *Smith v. People*, 51 Colo. 270, 36 L. R. A. (N. S.) 158, 161. In the above decision the court holds that a belief by a party that he has a gift of healing by prayer and an undertaking on his part so to heal for compensation paid him brings him within the operation of the statutes regulating the practice of medicine, and his failure to comply with the provisions of these statutes cannot be excused by his belief that it is his religious duty to exercise his alleged gift.

The principle abundantly settled by the above and other authorities is that the state is not to be stayed in the enactment of legislation looking to the general welfare by the fact that the enforcement of statutes enacted for this purpose will run counter to the religious beliefs of some of those who come within the purview of the statutes.

Even if it could be held that the foregoing statute interfered with the performance of what some parents regard as a religious duty, the statute would still be valid.

Point No. V

The question of the right of individuals or public officers to insist that religious instruction be given as part of the course in the common schools has been presented to the courts on many occasions. The principle that sectarian religious instruction may not be given in the public schools is so well established that it will not be discussed in this brief further than to call attention to some cases, most of which are recent, and to set forth to some extent the grounds upon which judicial decisions have been based.

In *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256, a school committee had regularly prescribed the Protestant version of the English Bible to be used as a reading book in the public schools; the plaintiff, a pupil in one of the schools, refused to read in this book and was expelled for that reason.

The following excerpts from the opinion of the court in that case are submitted as being in point in the instant case (page 263 of Report, 61 Am. Dec.):

"The common schools are not for the purpose of instruction in the theological doctrines of any religion or of any sect. The state regards no one sect as superior to any other, and no theological views as peculiarly entitled to precedence. It is no part of the duty of the instructor to give theological instruction; and if the peculiar tenet of any particular sect were so taught, it would furnish a well-grounded cause of complaint on the part of those who entertained different or opposing religious sentiments.

"But the instruction here given is not in fact, and is not alleged to have been, in articles of faith. No theological doctrines were taught. The creed of no sect was affirmed or denied; the truth or falsehood of the book in which the scholars were required to read were not asserted. No interference, by way of instruction, with the views of the scholars, whether derived from parental or sacerdotal authority, is shown.

"The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or in affirmance of the pagan creeds. A chapter in the koran might be read, yet it would not be an affirmation of the truth of Mohammedanism, or an interference with religious faith. The Bible was used merely as a reading-book, and for the information contained in it, as the koran might be, and not for religious instruction; if

suitable for that, it was suitable for the purpose for which it was selected. No one was required to believe or punished for disbelief, either in its inspiration or want of inspiration, in the fidelity of the translation or its inaccuracy, or in any set of doctrines deducible or not deducible therefrom."

The above excerpt very clearly illustrates the limitations of the right to impart religious instruction in the common schools.

The following excerpt, beginning at page 269 of the same Report, is submitted as applying directly to the question involved in the instant case:

"But the objection is urged that this is the creation of a religious test. But no requirements as to belief are made essential to entitle a scholar to the benefits of the common schools of the state. He may be a Jew or Mohammedan, a Catholic or Protestant; he may believe much or little, according to the instructions received at home—and for no such cause is he to be deprived of instruction. The state opposes no test or other impediment for the purpose of debarring any one from the public schools. But the claim of the plaintiff is much more liable to the exception that it is creating the subordination or preference of one sect or denomination over another. Her claim to be exempted from a general regulation of the school rests entirely on her religious belief, and is to the extent that the choice of reading-books shall be in entire subordination to her faith, and because it is her faith. The preference is manifestly given, if, in the selection to be made, the defendants were bound to defer to the doctrines and authority and teachings of the sect of which she is a member. The right of negation is, in its operation, equivalent to that of proposing and establishing. The right of one sect to interdict or expurgate would place all schools in subordination to the sect interdicting or expurgating."

What would be the effect of the granting of appellee's claims in the instant case is illustrated by the following excerpt, beginning at page 271 of the said report:

> "The right as claimed undermines the power of the state. It is that the will of the majority shall bow to the conscience of the minority, or of one. If the several consciences of the scholars are permitted to contravene, obstruct, or annul the action of the state, then power ceases to reside in majorities and is transferred to minorities. Nor is this all: while the laws are made and established by those of full age, the right of obstruction, of interdiction, is given to any and all children, of however so immature an age or judgment."

The duty of the state under such circumstances is stated in the following excerpt, beginning at page 272 of the said report.

> "The legislature establishes general rules for the guidance of its citizens. It does not necessarily follow that they are unconstitutional, nor that a citizen is to be legally absolved from obedience because they may conflict with his conscientious views of religious duty or right. To allow this would be to subordinate the state to the individual conscience. A law is not unconstitutional because it may prohibit what a citizen may conscientiously think right, or require what he may conscientiously think wrong. The state is governed by its own views of duty. The right or wrong of the state is the right or wrong as declared by legislative acts constitutionally passed. It may pass laws against polygamy, yet the Mormon or Mohammedan can not claim an exemption from their operation, or freedom from punishment imposed upon their violation, because they may believe, however conscientiously, that it is an institution founded on the soundest political wisdom, and resting on the sure foundation of inspired revelation. It may establish a day of rest as a civil institution, though the effect of it may be to deprive the Jew of one-sixth of his time for purposes of labor or of business."

Knowlton v. Baumhover, 182 Iowa, 691, 166 N. W. 202, 5 A. L. R. 841, is a recent case which directly involved the question of the right to impart religious instruction in the public schools, the suit having been brought primarily to enjoin the use of public money for the support of a parochial school. In the course of the opinion in that case the court, by Mr. Justice Weaver, said (page 848 of Report in 5 A. L. R.):

> " * * * If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used directly or indirectly for religious instruction, and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief. So well is this understood, it would be a waste of time for us at this point to stop for specific reference to authorities or precedents, or to the familiar pages of American history bearing thereon.
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> " * * * The right of a man to worship God, or even to refuse to worship God, and to entertain such religious views as appeal to his individual conscience, without dictation or interference by any person or power, civil or ecclesiastical, is as fundamental in a free government like ours as is the right to life, liberty, or the pursuit of happiness. Included in that sacred right is that of the parent to instruct and guide his own children in religious training. He has no right, however, to ask that the state, through its school system, shall employ its power or authority or expend money acquired by public taxation in training his children religiously. The same principles which assure to him the right of perfect freedom of conscience in matters

of church affiliation and religious belief forbid the employment of public authority of any kind to impose his views upon his neighbor or his neighbor's children. For like reasons, while within matters of religion, it is no less important that those who are employed in public stations, and especially in public schools, do not make use of the advantages of their position to teach or promote their peculiar religious notions. To guard against this abuse, most of our states have enacted constitutional and statutory provisions, forbidding religious exercises and religious teaching in all public schools, and all use or appropriation of public funds in support of sectarian institutions.

* * * * *

" * * * To constitute a sectarian school or sectarian instruction which may not lawfully be maintained at public expense, it is not necessary to show that the school is wholly devoted to religious or sectarian teaching. In *State ex rel. Weiss v. School Bd.*, 76 Wis. 177, 7 L. R. A. 330, 20 Am. St. Rep. 41, 44 N. W. 967, the court reached a decision somewhat at variance with our decision in *Moore v. Monroe*, 64 Iowa 367, 52 Am. Rep. 444, 20 N. W. 475, on the subject of Bible reading in the public schools, but its general discussion of the subject of religious and sectarian teaching covers the whole field of controversy on these subjects in a very able and convincing manner. Among other things, it says: 'The mere fact that only a small fraction of the school hours is devoted to such worship in no way justifies such use against an objecting taxpayer. If the right be conceded, then the length of time so devoted becomes a matter of discretion. If such right does not exist, then any length of time, however short, is forbidden. The relators as taxpayers of the district were compelled to aid in the erection of the school building in question and also to aid in the support of the school maintained therein. * * * Being thus compelled, * * * they have a legal right to object to its being used as 'a place of worship.' "

This case will be found valuable as containing excerpts from a number of other leading cases upon the question of sectarian religious instruction in public schools, among which are: *State ex rel. Freeman v. Schreve,* 65 Neb. 853, 59 L. R. A. 927, 91 N. W. 846, 93 N. W. 169; *Board of Education v. Minor,* 23 Oh. St. 211, 13 Am. Rep. 233; *Stevenson v. Hanyon,* 4 Pa. Dist. R. 395; *People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education,* 13 Barb. 408; St. Patricks *Orphan Asylum v. Board of Education,* 34 How. Pr. 229; *People ex rel. Ring v. Board of Education,* 245 Ill. 334, 29 L. R. A. (N. S.) 442, 92 N. E. 251, 19 Ann. Cas. 220; *Hysong v. Gallitzin School Dist.,* 164 Pa. 629, 26 L. R. A. 203, 44 Am. St. Rep. 632, 30 Atl. 482; *O'Connor v. Hendrick,* 184 N. Y. 421, 7 L. R. A. (N. S.) 402, 77 N. E. 612, 6 Ann. Cas. 432, and numerous other cases therein discussed.

Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1834, is a more recent case which involves the validity of an ordinance enacted by the city commission of Rome requiring some portion of the King James Version of the Bible, of either the Old or the New Testament, to be read, and prayer offered to God in the hearing of the pupils, daily during the regular sessions of the school, and also contains a review of the leading cases upon the subject.

Evans v. Selma Union High School District, (Cal. 1924) 222 Pac. 801, 31 A. L. R. 1121, is the most recent case on the subject to which our attention has been called. Following the report of this case in 31 A. L. R. will be found an annotation by the editors under the title "Sectarianism in Schools" in which the recent case of *Smith v. Donahue,* (1922) 202 App. Div. 656, 195 N. Y. Supp. 715, involving the question of the right of

public school officers to provide text books and other school supplies, furnished by the state, to parochial or other private schools was denied, and that of *State ex rel. Van Straten v. Milquet,* (1923) 180 Wis. 109, 192 N. W. 392, in which the right of school officers to use public school funds in paying a contractor to transport pupils to and from parochial schools was denied.

It may be urged that the cases cited under this point were denied upon specific constitutional and statutory grounds. However that may be, they represent the great weight of authority and predominating public opinion upon the question of sectarian religious instruction in connection with instruction in the common schools. It appears from the bill of complaint in the instant case that appellee's contention is based almost exclusively upon its claim of right to impart such instruction in connection with the common school work which it conducts.

Point No. VI

It is alleged in subdivision 4 of paragraph 15 of appellee's amended bill of complaint that the provision of subdivision "d" of section 5259, Oregon Laws, as amended, delegating to county school superintendents power and authority to determine when any child between the ages of eight and 16 years shall attend the public grade schools and when such child shall be exempt from the provisions of said law is in violation of those clauses of section 1 of article XIV of the amendments to the Constitution of the United States which provide that no state shall deprive any person of liberty without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

If a state has the right to compel children to attend public schools, it has the right to prescribe conditions under which exemption from such provisions may be extended, and the only restriction upon that right provided by the constitution is that there shall be no unjust discrimination, but that the law shall operate uniformly upon all persons within a class.

It is apparent that the subdivision of the act referred to is not subject to the objection that it applies only to a class, since it applies equally to all children of school age. Consequently, it appears that the objection of the defendants must be based on that provision of the act which delegates to county school superintendents the power to determine to whom the exemption shall be extended.

The act does not provide for or by its terms permit of any discrimination by county superintendents, but clearly contemplates that the provisions of the act shall be applied to all in an equal and uniform manner.

The objection appears to be that the provision referred to constitutes an attempt to delegate legislative power to a public officer.

It must be admitted that it is the exclusive function of the Legislative Department to enact laws, but it has at all times been recognized that there is a clear distinction between the enactment of laws and the power to determine under what conditions they shall become effective. It is so apparent that the Legislature could not prescribe the details of the operation of very many of the laws enacted by such bodies that the necessity for the delegation to some subordinate body of the power to determine the details regarding its operation does not require argument.

The objection raised in this instance has been considered by the courts on very many occasions, and the rule is now firmly established and uniformly recognized

that, while the Legislature may not delegate power to enact a law, it can delegate the power to determine the conditions under which it is to take effect in a given instance. Any person having knowledge of the details of the administration of public laws knows that it has always been customary to delegate to subordinate bodies authority such as has been conferred upon county school superintendents in this instance. The question has been before the United States Supreme Court and other federal courts with reference to such powers that have been delegated to executive and administrative officers of the government, including the president of the United States, and, in the state of Oregon, we have very many laws delegating to subordinate boards, commissions and individuals the power to determine when laws shall be given effect in given instances. The Superintendent of Banks has power to declare a bank insolvent and to take charge of and administer its affairs. In so doing, he is guided by the facts and circumstances and his own judgment as to whether or not such action is required on his part. The same thing is true as to the powers of bank examiners under the national banking laws. Powers similar to those delegated to county superintendents in this instance are conferred upon the Secretary of State, the Insurance Commissioner, the Corporation Commissioner, the State Engineer, the Public Service Commission and numerous other commissions, boards and individuals in this state, and the power has been so universally recognized as not to be subject to question at this time. The power extended to the county superintendent is not arbitrary but is to be exercised in a cautious and reasonable manner. He is authorized to act only when, upon examination of the child being taught by parent or private teacher, he shall determine that such child is

not being properly taught. What constitutes proper instruction is not a question to be arbitrarily decided by the superintendent but is one in which he is to exercise a reasonable discretion. Should he overstep the bounds of his authority or act in an unreasonable manner, his action may be restrained or set aside by the court. On the other hand, it was intended that he should be given broad powers since he, in the contemplation of the Legislature, is, by reason of his position and knowledge of such matters, most eminently qualified to determine whether or not a given child is receiving proper instruction.

There is a legal presumption that official duty has been properly performed and likewise a presumption that official duty will be properly performed. Until there is ground for complaint that there has been an arbitrary disregard of such duties, the appellee is not in a position to appeal to the court for relief from the effect of the provisions of the said subdivision 4.

The argument directed against the validity of the statute on this ground will doubtless be based on the fact that the statute fails to define the rules which are to govern the county school superintendent in granting or withholding the permission above referred to.

It is extremely difficult to draft a statute which will make proper provision for all of the situations which may arise in practice. Any specification of the cases which would entitle the school superintendent to grant the permission referred to in the subdivision would be apt to prove incomplete in practice. There is no presumption that the discretion vested in the school superintendent will be harshly or arbitrarily exercised. The presumption is, on the contrary, that all citizens will be treated alike, and the permission granted by the school

superintendent will be confined to cases calling for special treatment. The compulsory education statutes of Arizona, Colorado, Delaware, Georgia, Idaho, Pennsylvania, Virginia, Washington and West Virginia all vest a dispensing power with some official and provide no basis or rule to govern the official in exercising the power granted.

Session Laws of Arizona for 1921, chapter 143, section 1 (a), subdivision 5.
Mills' Annotated Statutes of Colorado, 1912, section 639.
Session Laws of Delaware for 1921, article V, chapter 160, section 41.
Park's Annotated Code of Georgia, 1914, Supplement of 1922, section 1444 (a).
Compiled Statutes of Idaho, 1919, section 1018.
Purdon's Digest of the Laws of Pennsylvania, 13th Ed., Supplement A-Y, 1916-1921, section 154.
Session Laws of Virginia, 1922, chapter 381, section 11.
Remington's Washington Code, 1922, section 5072.
Barnes' Code of West Virginia, 1923, chapter 45, section 122, subdivision 1.

The statutes of New Hampshire and Wyoming are on the border-line. The New Hampshire statute authorizes the exercise of the dispensing power when "the moral or physical welfare of such child" shall call for it. See Laws of New Hampshire, 1919, chapter 84, section 1. The Wyoming statute provides that the dispensing power shall be exercised in the case of "pupils to whom the provisions of this act might work a hardship"; Session Laws, 1923, chapter 43, section 1, amending section

2260 of the Wyoming Compiled Statutes. The foregoing provisions are so general in their character that they can scarcely be said to be a guide to the officer exercising the dispensing power and we think that it may with propriety be said that there are eleven states whose statutes contain in substance the provision which it is alleged makes this statute unconstitutional.

The question undertaken to be raised has frequently been before the courts for their determination and the rule announced both by the supreme court of the United States and by the supreme court of Oregon is contrary to the contention advanced.

Fischer v. St. Louis, 194 U. S. 361, 48 L. Ed. 1018, 1023.

This case involved the validity of an ordinance forbidding the location of stables in a certain district without permission from the council. The ordinance contained no rules to guide the council in granting or withholding such permission. On page 371 of the official report and page 1023 of Lawyers' Edition it is said by Mr. Justice Brown:

> "We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public."

On page 1024 of Lawyers' Edition the learned justice says:

> "The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal. It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases."

The same rule has been announced by the supreme court of Oregon.

State v. Briggs, 45 Or. 366, 375-376.

This case involved the validity of the legislation providing for a board of barber examiners. The statute authorized this board to license those who were to engage in the occupation of barber in the state of Oregon. The court held that the presumption is that the board would not act arbitrarily. The possibility that they might do so does not make the statute unconstitutional. It was expressly held in this case that the legislature was under no necessity to prescribe the qualifications of a barber. The same rule has been announced by a number of other courts.

Ex parte Fiske, 72 Cal., 125, 13 Pac. 310.

This case involved the validity of an ordinance of the city of San Francisco. It fixed the fire limits and forbade the erection and repair of wooden buildings therein, with a proviso that the fire wardens might permit such repair and that in such case the ordinance should be inoperative. In response to the same objection with which we are now confronted the supreme court of California said, on page 311 of the Pacific Reporter:

> "And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise it wantonly, or for purposes of profit or oppression. *Neither is the granting of permission in particular instances to be considered as the taking away of any rights from those to whom such permissions are not*

given. The latter would be in no better position if such permissions were given to none, or if there was no power to give them at all."

Ex parte Spencer, 149 Cal. 396, 86 Pac. 896, 898.

This case involved the validity of a child labor law. It contained a provision that during vacation children over twelve could work in the prohibited occupations, provided the principal of the school gave them a permit. It is inferrable that the statute does not define the rules which should govern principals in granting or withholding permits. The court said:

> "There is no discrimination. The legislature has the power to make such reasonable regulations as these with respect to the time of the vacations of schools."

The same rule is announced in *Ex parte Weber*, 149 Cal. 392, 86 Pac. 809.

City of Eureka v. Wilson, 15 Utah 53, 48 Pac. 41, 44.

This case involved the validity of an ordinance with reference to the moving of houses through the streets. A discretion was committed to an officer of the municipality to grant permission so to do. The order contained no rules to guide the officer in the exercise of this discretion. The court upheld the ordinance and said:

> "It is true, there is a discretion vested in an officer, but such discretion does not mean an absolute or arbitrary power. It is a legal discretion, which must be exercised in a reasonable manner. Where the law leaves the exercise of a power to the discretion of an officer, it does not mean that he shall exercise such discretion wantonly or arbitrarily, to the injury of any subject."

Lee v. Hoffman, 182 Iowa 1216, 166 N. W. 565.

This case concerned an anti-fraternity law. Notwithstanding the statute, school boards were entitled to permit the existence of some societies or associations and the rules which were to guide them in granting this permission were not contained in the statute. The Iowa court nevertheless held that the statute was constitutional.

State v. Yopp, 97 N. C. 477, 2 S. E. 458.

This case involved the validity of a statute forbidding bicycles on certain state highways without the consent of the road superintendent. The court said:

> "It is further objected that the statute leaves it to the arbitrary discretion of the superintendent of the road named to allow or disallow persons to use a bicycle or tricycle, or other nonhorse vehicle' on it. This is a misapprehension of the true import of the provision cited. The discretion vested in the superintendent is not arbitrary. He is made the agent of the law, as well as superintendent, and he is bound to exercise the discretion vested in him, honestly, fairly, reasonably, and without prejudice or partiality, for the just purpose of effectuating the intention of the statute. If there be times or seasons or occasions when persons wish to use bicycles or other like vehicles, embraced by the prohibitory clause of the statute in question, it is his plain duty to allow them to do so at such times. The authority is not his. He is simply made the agent of the law for a lawful purpose, and he is amenable, as such, for any prostitution of the power so vested in him. And the creation of the discretion implies that there may be occasions or times or seasons when bicycles may be used on the road. It not infrequently happens that statutes require particular things to be done, or not to be done, that must be made to depend upon the judgment and discretion, of a designated agent or commissioner or

officer, and the discretion in such cases is not arbitrary; it is lawful, and must be lawfully exercised. The learned counsel for the appellant directed our attention to the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. That case, in our judgment, has no application here. The court declared a city ordinance void upon the ground that its manifest purpose was not a just and reasonable regulation, but unlawful, and the discretionary powers conferred upon certain authorities of the city were purely arbitrary, intentionally so, and therefore unlawful and void."

State v. *Wolf*, 145 N. C. 440, 59 S. E. 40.

This case involved the constitutionality of a compulsory education statute applicable to Indians in a certain county. It contained the following proviso:

> "Provided further, that nothing in this act shall prevent the proper school authorities from excusing any child from the provisions of this act, when in their judgment they deem it necessary."

The court held that the proviso was a proper exercise of the legislative power and that the statute was valid.

There is nothing out of harmony with the foregoing decisions in *White* v. *Holman*, 44 Or. 180, 192. What the supreme court of Oregon condemned in the above case was not a statute for the licensing of sailor boarding houses, but the manner of its administration. The evidence showed that the board to whom the discretion had been committed under the statute was acting arbitrarily and its conduct was condemned as creating a monopoly, contrary to section 20 of article I of the Oregon Constitution.

Point No. VII

SUBDIVISION NOT ESSENTIAL TO STATUTE

If it were held, contrary to the decisions above cited, that subdivision (d) of section 5259 of the code as amended is unconstitutional, it would not by any means follow that the statute itself should be declared invalid. The rule in such cases is thus stated in *Cooley's Constitutional Limitations* (7th Ed.), pages 246-247:

> "It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. * * * It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. * * * If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

The rule in this jurisdiction is settled by the case of *Gantenbein v. West*, 74 Or. 334. This case involved the validity of an act providing for the transfer of probate jurisdiction in Multnomah county to the circuit court. The statute also provided for an additional circuit judge. Mr. Justice McBride held the former provision unconstitutional but upheld the remainder of the statute as valid. We quote from pages 340 to 341 of the Oregon report:

> "As before remarked, that portion of the act providing for an additional judge in Multnomah county, namely, the first two sections, is easily separable from

those sections heretofore held unconstitutional. All matters relating to the transfer of the probate jurisdiction of the county court into the circuit court, and the transformation of the county judge into a circuit judge with many and variegated powers, could be stricken both from the title and from the act itself, and yet leave a complete act providing for an additional judge.

"It is going far into the realm of speculation to say that the additional judgeship would not have been created had the sections providing for such transfer been omitted. On the face of the act they are not so interdependent that we can presume that such a result would have followed the omission of the last four sections. Such a conclusion would be to presume against the constitutionality of an act instead of in its favor; and it is a canon of statutory construction that if a statute can be given any reasonable interpretation consistent with its validity, such interpretation should be adopted."

Kiernan v. Portland, 57 Or. 454, 463.

This case involved the validity of an amendment to the city charter providing for the erection of a public bridge. So much of the act as attempted to impose on Multnomah county the care and maintenance of the bridge was held to be unconstitutional, but the remainder of the statute was upheld. The court said:

"It does not follow, however, that the whole amendment is void merely because one clause, easily separable from the rest, is ineffective."

Peterson v. Lewis, 78 Or. 641.

Chapter 337 of the Laws of 1915, found on page 537 of the session laws for that year, abolished the office of highway engineer and transferred his duties to the state engineer. Section 3 of the statute was held to be uncon-

stitutional as not embraced in the title of the act. The court said:

> "We understand it to be a governing rule of construction to give a statute such a meaning, if possible, as will render it valid and effectuate the will of the lawmakers as expressed. * * * It is a rule of statutory construction that, where the first section of a statute conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by unconstitutional provisions in a later section which do not conform to this policy and intent. In such case the later provision is nugatory and will be disregarded."

Southern Pacific Co. v. Campbell, 189 Fed. 696.

This case involved the validity of a statute passed in 1907 by the legislature of Oregon creating a railroad commission and regulating carriers. Section 27 was held invalid because applying to interstate as well as domestic commerce. On page 700 Judge Wolverton said:

> "I am not to be understood as holding the entire act to be void and inoperative, very far from it, as the remainder of the act may stand as valid and operative without the provisions of section 27."

Hirschfield v. McCullagh, 64 Or. 502.

This case held unconstitutional so much of section 6707, L. O. L., as required the payment by a foreign corporation of a license fee based upon its capital stock. The court said, on page 517:

> "But it does not follow that because this part of the section is void that the whole section is void. Its provisions are not so interdependent that other requirements can not be separated from the single invalid provision."

Ex parte Case, 70 Or. 291.

In this decision the court held unconstitutional sections 4961 to 4967, L. O. L., in so far as they applied to peddlers engaged in interstate commerce. On page 305 of the report the court said:

> "It was contended at the argument that, inasmuch as the statute was confessedly inapplicable to persons engaged in purely interstate commerce, it was wholly void. This argument is predicated upon the idea that the legislative assembly would not have enacted the statute in question if it could have foreseen that it would be applicable only to persons and property within the state. Many authorities are cited which are supposed to sustain this doctrine; but in the great majority of them at least the law in question contains numerous provisions so dependent upon one another that the valid ones can not be separated from those determined unconstitutional, without destroying the system of taxation or regulation sought to be established. In the statute under consideration, however, there are no interdependent provisions. The law is single and direct in its purpose. With its effect, except as controlled by constitutional limitations, we have nothing to do. We can not presume that a coordinate branch of the government was ignorant of the provisions of the national constitution and the paramount authority of the general government over interstate commerce."

Simon v. Northrup, 27 Or. 487, 503-506.

This case involved the validity of a statute passed in 1895 and found on page 421 of the session laws of that year providing for the acquistion by the city of Portland of the Morrison street bridge, the Stark street ferry and the upper deck of the steel bridge. The conclusion reached by the court is thus stated on page 506 of the report:

> "Having examined all the objections urged, we conclude that the act under consideration is constitutional and valid, except in so far as it requires the county of

Multnomah to levy a tax and pay the interest and principal on the bridge bonds of the city of Portland and to maintain a ferry at Sellwood."

The same principle is announced in *State v. Smith*, 56 Or. 21. The rule so often announced in Oregon also has the support of courts of high standing elsewhere.

Fisher v. McGirr, 1 Gray 1.

This case involved the validity of a statute prohibiting the sale of liquors. It provided for two methods of enforcement of the statute, one *in rem* and the other *in personam*. The statute was held unconstitutional in part by Chief Justice Shaw. He said, on pages 21 to 22 of the report:

"We suppose the principle is now well understood, that where a statute has been passed by the legislature, under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of legislative power, or is repugnant to any provision of the constitution, such part thereof shall be adjudged void and of no avail, whilst all other parts of the act, not obnoxious to the same objection, will be held valid and have the force of law. There is nothing inconsistent, therefore, in declaring one part of the same statute valid and another part void."

Commonwealth v. Clapp, 5 Gray 97, 100.

Here the court said:

"It has been too often stated and explained, now to require authorities, that a statute may be unconstitutional in some particular provision and not in others. A statute is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish some object prohibited by the constitution, or to accomplish some lawful

and even laudable object by means repugnant to the Constitution of the United States or of the commonwealth. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void, because they are associated in the same act, but not connected with or dependent on others which are unconstitutional."

In re Groff, 21 Neb. 647, 33 N. W. 426.

This case involved the validity of a judicial apportionment act passed by the Nebraska legislature. On page 431 of the Northwestern Reporter the court said:

"We hold, therefore, that where a part of an act is not dependent upon that which is unconstitutional, and is complete in itself, and capable of being executed, it will be maintained. So far as this act affects the eleven districts spoken of, it fully complies with these conditions, and, as to such districts, must be sustained."

Donnersberger v. Prendergast, 128 Ill 229, 21 N. E. 1, 2.

In this case the Illinois court announced the rule in the following language:

"Therefore, although a portion of the statute under consideration is unconstitutional, it does not follow that the court is authorized to declare its other provisions void, if they are separable from the void provisions, and capable of enforcement independently of such provision, unless it shall appear that all of the provisions of the act are so dependent on each other, operating together for the same purpose, or are otherwise so connected together in meaning that it can not be presumed that the legislature will have passed the one without the other

provision. When the constitutional and unconstitutional provisions are distinct and separable, the valid provisions may stand as though the invalid provisions had not been introduced."

To the same effect *Rood v. Carger,* 49 Cal. 117.

Subdivision (d) of section 5259 is certainly not essential to the compulsory education statute and in view of the foregoing authorities there is no room for the contention that the electors would have refused to adopt the statute in question but for the inclusion of this subdivision. So to hold would be to presume against the constitutionality of the statute, whereas all presumptions are in its favor. The argument on this branch of the case is greatly strengthened by the fact that the subdivision is a part of the act of 1911 and the amendment complained of has not substantially changed it.

TITLE OF ACT

It is contended in the companion case that the statute is unconstitutional because its title does not conform to the requirements of section 20 of Article IV of the Constitution. The title of the statute is "an act to amend section 5259, Oregon Laws." If there is such compilation as Oregon Laws, the rule is well settled that such a title is sufficient.

State v. Phenline, 16 Or. 107, 109;
Ex parte Howe, 26 Or. 181, 184;
Murphy v. Salem, 49 Or. 54, 58.

In 1919 the legislature provided for the codification of the laws. See chapter 266 of the Laws of 1919. Section 4 of this statute, found on page 440 of the Session Laws for 1919, contains the following sentence:

> "Said compilation shall be known by such name as may be agreed upon by the supreme court acting jointly with the code commissioner hereinabove provided for."

On the 4th of June, 1919, the supreme court of Oregon passed the following order, which is duly found in the journal:

> "In the matter of a code commissioner:
>
> "Now at this time it is ordered by the court that Conrad P. Olson be and he is hereby appointed code commissioner as authorized by chapter 266, Laws of 1919. The compensation of said commissioner to be fixed hereafter.
>
> "It is further ordered that such codification shall be known as 'Oregon Laws'."

The consent of the code commissioner to the order so passed is proved by the fact that the code, when issued, bore the title "Oregon Laws." This case therefore clearly comes within the rule announced in the three decisions of the Oregon court last above cited. It is, of course, clear that the question is one of Oregon law and that the decisions of the supreme court of Oregon thereon are binding.

The real objection raised by appellee is disposed of by the condition in section 20 of article IV, Constitution of Oregon, which reads as follows:

> "But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

For convenience in considering the effect of the amendment we submit the old statute and the new in parallel columns:

OLD LAW	NEW LAW
Sec. 5259. *Children Between the Ages of Nine and Fifteen Years*—Every parent, guardian or other person in the state of Oregon having control or charge of any child, or children between and including the ages of nine and fifteen years of age, shall be required to send such child or children to the public schools for a term or period of not less or more than the number of months of public school held annually in the district in which such parents, guardian or other person in parental relation may reside; provided, that in the following cases, children shall not be required to attend public schools:	Sec. 5259. *Children Between the Ages of Eight and Sixteen Years*—Any parent guardian, or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases children shall not be required to attend public schools:
(a) *Children Being Taught in Private School*—Any child, or children, who is or are, being taught for a like period of time in a private	(a) *Children Physically Unable*—Any child who is abnormal, subnormal or physically unable to attend school.

or parochial school such branches as are usually taught in the first eight years in the public schools, or has, or have, already acquired the ordinary branches of learning taught in such schools the fact of which acquisition of such ordinary branches of learning by such child, or children, shall be determined by the school board in charge of the public school in such district;

(b) *Children Physically Unable*—Any child, or children, who is, or are physically unable to attend school. In such cases the truant officer shall require a written statement of a competent physician certifying that such child, or children, is, or are physically unable to attend school;

(c) *Distance from School*—Children between the ages of nine and ten years of age whose parents live more than one and one-half miles, and children over ten years of age whose parents live more than three miles, by the nearest traveled road, from some public school; provided, that if transportation is furnished pupils in said district this exemption shall not apply.

(b) *Children Who Have Completed the Eighth Grade*—Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

(c) *Distance from School*—Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

(d) *Private Instruction*—Any child, or children, who is, or are, being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school, but before such child, or children, can be taught by a parent or private teacher, such parent or private teacher must receive written permission from the county superintendent, who is hereby authorized to grant such permission only in case of necessity, and such permission shall not extend longer than the end of the current school year. Such child, or children, must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If after such examination the county superintendent shall determine that such child, or children, is, or are, not being properly taught, then the county superintendent shall order the parent, guardian or other person in parental relation to send such child, or children, to school the remainder of the school year. Failure on the

(d) *Private Instruction*—Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or a private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years, shall fail to comply with any provision of this section, he shall

part of the parent, guardian or other person in parental relation to comply with the order of the county superintendent shall render such person liable to the penalty provided for in this act.

Sec. 5260. *Penalty for Failure by Parent, etc., to Comply*—In case any parent or other person in parental relation shall fail to comply with the provisions of this act he shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be liable to a fine of not less than $5, nor more than $25, or by imprisonment in the county or city jail not less than two nor more than ten days, or by both such fine and imprisonment in the discretion of the court.

be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This act shall take effect and be and remain in force from and after the first day of September, 1926.

The title of the amendatory act is: "An act to amend section 5259, Oregon Laws."

The effect of such amendment is stated in Lewis' Sutherland Statutory Construction, 2d Ed., Vol. 1, p. 236, Sec. 139, to be as follows:

> "Where the title of the amendatory act specifies the section or sections to be amended, the weight of authority is that the amendments must be germane to the subject matter of the sections specified, and that amendments of other sections, not specified, will be void."

See also:

Newman v. State, 101 Ga. 534, 28 S. E. 1005;
State v. Am. Sugar Ref. Co., 106 La. 533, 31 S. 181;
Horkey v. Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. St. Rep. 623.

The result of the attempt to incorporate within section 5259, by amendment, provisions theretofore not contained in that section is that said provisions are void, but that the other provisions of said amended section are not thereby affected, and the provisions of section 5260 remain in full force and effect.

Conclusion

The first American colonies were founded and settled largely by refugees from Europe who sought in this new continent a home where one might be permitted to worship God according to the dictates of his own conscience, free from dictation on the part of any government. The early history of the colonies reveals much of intolerance in religious matters, but in the formation of our National Government the imperative necessity that church and state should ever be maintained as separate institutions, if we were to have an enduring government and this was to be in fact the land of the free, was early recognized. In the gradual evolution of political and religious matters in the nation, as well as in the state, the state and the church have ever been maintained as separate and distinct institutions.

The growth of the public school system has been gradual. During the early history of the country, owing to sparse population in many localities and the poverty of the settlers, public schools for all could not be maintained, and, as a matter of necessity, parents were left to provide for the education of their children as best they could. Consequently many children grew up without even the rudiments of an education. Some were educated, at least to some extent, by parents, and the education of others was provided for by private schools.

The necessity for any other kind of school than that provided by the state has ceased to exist. The public school is everywhere recognized as being an institution vital to the welfare of the individual citizen, and to that of the state and nation. The state, at great expense, has provided everything in the line of facilities for the education of youth in the public schools that experience has indicated to be to their best interests. To that end, insti-

tutions devoted exclusively to the instruction and training of teachers have been founded and are being maintained. Such institutions are conducted by specialists in matters pertaining to the education of the young, and, as a result, the methods of instruction and means of promoting the health and education of the children in the public schools have been greatly improved in recent years. Our public school buildings, as now constructed, represent the result of experience and great expense in providing for the physical and intellectual welfare of the children who are trained therein.

The welfare of minor children is a matter in which the state is interested to such an extent that it has asserted the right to take a babe from its mother's arms and deprive her of its custody, training and society, if it is apparent that the welfare of the child or of the public requires such action.

No attempt has been made on the part of appellee to show that the training received by children who attend its schools is superior to that which they would receive in the public schools, and no such condition or result could be shown. Comparison of private and parochial schools with those maintained by the state will not reveal a degree of superiority of the former which justifies a demand to be permitted to continue same as a right guaranteed by the Constitution.

The argument of appellee in the lower court has been very ably directed to a claim that parents and children have been deprived of natural liberty guaranteed by the federal constitution and to an appeal for protection from such alleged deprivation. The very able briefs filed on behalf of appellee in the lower court have failed to reveal any particular in which the alleged deprivation has operated to the disadvantage of either parents or children.

except that it has deprived them of an opportunity to impart sectarian religious instruction in connection with the education of children in the schools. Having in mind the fixed purpose of our government in matters relating to the separation of church and state, the continued and consistent efforts that have been maintained to continue them as separate institutions, and the result of the vital legal struggles which have arisen over the question of sectarian instruction in the public schools, we submit that the reason why the people of the state of Oregon, under their initiative powers, have enacted a law requiring that all children shall be educated exclusively in the public schools, when their physical condition so permits, or at home, is apparent, and that in making such provision they acted within well defined and well established powers of government. In its last analysis, the argument of appellee is that it demands, as a right guaranteed under the Constitution of the United States, the right to conduct an institution for the instruction of children of common school age in opposition to the public schools maintained by the state, in order that it may therein give sectarian religious instruction which is prohibited in the public schools.

If a few such institutions can lawfully be maintained on behalf of the different religious denominations, the number which may ultimately be so maintained cannot consistently be limited, and if this court should hold that the state does not have the right to require all children within its borders to be educated in its public schools, religious denominations may, without constitutional restrictions, develop a system of educational training which will result in doing away with public schools.

The great majority of American youth receive their religious instruction in purely sectarian institutions or in

the home, separate and apart from their common school education or training, and it has been settled that sectarian religious instruction in our public schools will not be tolerated. The right demanded by appellee is denied to all whose children attend the public schools.

Appellee places great reliance upon the recent case of *Meyer v. Nebraska* (262 U. S. 390 Sup. Ct. Rep. 390 to 403, 67 L. Ed. 1042), and its companion cases. We quote from the opinion of Mr. Justice McReynolds in that case as follows:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the fourteenth amendment. 'No state * * * shall deprive any person of life, liberty or property without due process of law.'
>
> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539,

3 Ann. Cas. 1133; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Truax v. Raich*, 239 U. S. 33, L. ed. 131, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Adams v. Tanner*, 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; *New York L. Ins. Co. v. Dodge*, 246 U. S. 357, 62 L. ed. 772, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918F, 593; *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124; *Adkins v. Children's Hospital* (April 9, 1923) 261 U. S. 525, ante, 785, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 394; *Wyeth v. Board of Health* (Wyeth v. Thomas), 200 Mass. 474, 23 L. R. A. (N. S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499.

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

"Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been

regarded as useful and honorable—essential, indeed, to the public welfare. Mere knowledge of the German language can not reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

"The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The supreme court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' *Nebraska Dist. v. McKelvie*, 108 Neb. 448, 187 N. W. 927 (April 19, 1922). Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."

This appellant submits that, when given its broadest interpretation, the said decision does not apply to the situation presented by the instant case.

As we understand the case of *Meyer v. Nebraska, supra*, it involved the right of an individual to engage in the occupation of teaching and the right of parents and children to have their children receive instruction in German in a parochial school which was conducted pursuant to statute. We understand the effect of that decision to be that there did not appear to be any such immediate demand for the discontinuance of such instruction, to the deprivation of the right of the teacher

to engage in his profession and of the liberty of the parents and children to demand instruction in the German language, as to warrant such legislation. The gist of the opinion appears to us to be contained in the following excerpt therefrom (page 1046 of Report of 67 L. Ed.):

> "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the supreme court. *Adams v. Tanner*, 244 U. S. p. 594, 61 L. ed. 1342, L. R. A. 1917 F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition, with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.
>
> "As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals, or understanding of the ordinary child."

In this connection we beg leave to call to the court's attention the following excerpt from the dissenting opinion of Mr. Justice Holmes in the case of *Truax v. Corrigan*, 257 U. S. 312, Sup. Ct. Rep. 312, 376, 66 L. Ed. 254, 268:

> "I must add one general consideration. There is nothing that I more deprecate than the use of the fourteenth amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. * * *"

The case of *Adams v. Tanner*, 244 U. S. 590, 61 L. Ed. 1336, is urged by appellee as being conclusive of the questions involved in the instant case.

As we understand that case, it involved the right of a citizen of the United States to engage in a useful and usual occupation. The statute involved was held by the court to be prohibitory, rather than regulatory, and we understand the court to have held (page 1343 Rep. in 61 L. Ed.):

> "'The fourteenth amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations which may, or may not, be harmful to the public, according to local conditions, or the manner in which they are conducted.' *Murphy v. California*, 225 U. S. 623, 628, 56 L. ed. 1229, 1232, 41 L. R. A. (N. S.) 153, 32 Sup. Ct. Rep. 697."

We submit that the said case presents a question quite distinct from one involving the right of a state to require that all children between the ages of eight and sixteen years attend schools which are provided and maintained by the state as a part of its governmental functions, and the personal right or liberty of parents to have their children attend a parochial or private school, when it does not appear that the training received by the children in such private or parochial schools is superior in sixteen years attend schools which are provided and maintained by the state as a part of its governmental functions, and the personal right or liberty of parents to have their children attend a parochial or private school, when it does not appear that the training received by the children in such private or parochial schools is superior in any way to that which they would receive in public schools, and when it does appear that the liberty claimed to be denied by such a law is liberty to give sectarian religious instruction in connection with common school training; a thing which no one would have the temerity to demand as part of the course of instruction in the public schools."

Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. Rep. 7, 60 L. Ed. 131, L. R. A. 1916D, 545 Ann. Cas. 1917B, 243. In that case it was held (page 134, Report in L. Ed):

"* * * Being lawfully an inhabitant of Arizona, the complainant is entitled under the fourteenth amendment to the equal protection of its laws. The description, 'any person within its jurisdiction', as it has frequently been held, includes aliens. * * *"

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"It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and

welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure.

* * * * *

"If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these can not be so broadly conceived as to bring them into hostility to exclusive federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the federal government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they can not live where they can not work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country

under the authority of the acts of congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

"It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor'; that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of 20 per cent of his employes. But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it can not be denied that the authority exists to make its measures to that end effective. *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44. If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employes to be aliens, or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (*Consolidated Coal C. v. Illinois*, 185 U. S. 203, 207, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; *McLean v. Arkansas*, 211 U. S. 539, 551, 53 L. ed. 315, 321, 29 Sup. Ct. Rep. 206; *Miller v. Wilson*, 236 U. S. 373, 384, 59 L. ed. 628, 632, 35 Sup.

Ct. Rep. 342); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law."

For reasons heretofore stated in connection with argument regarding the effect of the decision of this court in the cases of *Meyer v. Nebraska, supra,* and *Adams v. Tanner, supra,* we submit that the decision in the case of *Truax v. Raich* is not controlling as to the issues involved in the instant case.

Terrace v. Thompson, Advance, Sheet No. 3, p. 35, U. S. Supreme Court Advance Opinions, December 1, 1923. This case presents a question involving the rights of aliens and upholds a statute denying to them the right to own or control agricultural land, as constituting a reasonable exercise of the police power, pursuant to a federal law withholding from certain aliens, whose rights were involved, the privilege of naturalization. It distinguishes the rights of such aliens from the rights of aliens involved in the case of *Truax v. Raich, supra.* We refer to this case for the reason that its principles were invoked by appellee in the lower court, and because it contains a recent expression of this court regarding the police powers of the states in matters of public policy.

Appellant again invites the attention of the court to the rule stated in *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253, 256-257, and other cases involving the validity of statutes enacted in the exercise of the police power for the purpose of meeting conditions which the legislature deemed it advisable to correct, and in enacting which the legislature is presumed to have investigated the questions of fact upon which its conclusion that such legislation was required were based, that the legislature is the exclusive judge of the necessity for such legislation and that where the question presented to the court involves the determination of matters of fact this court will not investigate such questions or pass upon the necessity for such legislation.

In this case it is to be presumed that the legislature and the people of the state investigated the question of the necessity for such legislation and found and determined, as a question of fact, that the instruction given to children of the ages affected by the amendment in the public schools of the state was better and more complete than that provided by private institutions; that facilities for protecting the health of such children when in school were better provided for in the public schools than in private institutions, and that every other fact upon which such legislation might properly be based, was inquired into by them and found to require such legislation. In that respect the case differs materially from that of *Meyer v. Nebraska, supra*, where the court was enabled to take judicial notice of the fact that the mere teaching of the German language did not in and of itself have such an effect as to warrant an exercise of the police power denying to one, who depended upon the giving of

such instruction as a means of livelihood, the right to teach that language, or such effect as to warrant depriving parents of their right to have their children so instructed.

Respectfully submitted,

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FEB 2 1925

(20,510)

Supreme Court of the United States

OCTOBER TERM, 1924

No. 454

WALTER M. PIERCE, as Governor of the State of Oregon, ISAAC H. VAN WINKLE, as Attorney-General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon,

Appellants,

vs.

HILL MILITARY ACADEMY

Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellant, Isaac H. Van Winkle

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Laws of Nevada, 1920-1921, c. 157, sec. 1, amending s. 203 of the Act of March 20, 1911	25
20 Ruling Case Law, 597	13
Schouler on Domestic Relations, 5th ed. sec. 235	13
35 Cyc. 1122	26

(30,549)

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1924

No. 584

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney-General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon,

Appellants,

vs.

HILL MILITARY ACADEMY

Appeal from the District Court of the United States for the District of Oregon

Brief of Appellant, Isaac H. Van Winkle

STATEMENT

Appellee is a private corporation, organized and existing under the laws of the state of Oregon, and is engaged in conducting a private school in the city of Portland in said state, in which it affords educational training to children of common school age, which it alleges to conform in all respects to the training received by children of like age in the public schools of Oregon.

Appellee further alleges that it owns and maintains valuable property and equipment which is used in conducting said school and the value of which would be materially reduced if it were forced to discontinue the operation of same.

On the 7th day of November, 1922, there was submitted to and enacted by the legal voters of the state of Oregon a certain measure which, for convenience, is herein set out in full, in parallel columns with the law as it existed prior to the adoption of said measure:

OLD LAW	NEW LAW
Sec. 5259. *Children Between the Ages of Nine and Fifteen Years.*—Every parent, guardian or other person in the state of Oregon having control or charge of any child, or children between and including the ages of nine and fifteen years of age, shall be required to send such child or children to the public schools for a term or period of not less or more than the number of months of public school held annually in the district in which such parents, guardians or other persons in parental relation may reside; provided, that in the following cases, children shall not be required to attend public schools:	Sec. 5259. *Children Between the Ages of Eight and Sixteen Years.*—Any parent, guardian, or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases children shall not be required to attend public schools:

(a) *Children Being Taught in Private School*—Any child, or children, who is or are being taught for a like period of time in a private or parochial school such branches as are usually taught in the first eight years in the public schools, or has, or have, already acquired the ordinary branches of learning taught in such schools the fact of which acquisition of such ordinary branches of learning by such child, or children, shall be determined by the school board in charge of the public school in such district;

(b) *Children Physically Unable*—Any child, or children, who is, or are physically unable to attend school. In such cases the truant officer shall require a written statement of a competent physician certifying that such child, or children, is, or are physically unable to attend school;

(c) *Distance from School*—Children between the ages of nine and ten years of age whose parents live more than one and one-half miles, and children over ten years of age whose parents live more than three miles, by the

(a) *Children Physically Unable*—Any child who is abnormal, subnormal or physically unable to attend school.

(b) *Children Who Have Completed the Eighth Grade*—Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

(c) *Distance from School*—Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more

nearest traveled road, from some public school; provided, that if transportation is furnished pupils in said district this exemption shall not apply.

(d) *Private Instruction*—Any child, or children, who is, or are, being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school, but before such child, or children, can be taught by a parent or private teacher, such parent or private teacher must receive written permission from the county superintendent, who is hereby authorized to grant such permission only in case of necessity, and such permission shall not extend longer than the end of the current school year. Such child, or children, must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If after such examination the county superintendent shall determine that such child, or children, is, or are, not being properly taught,

than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

(d) *Private Instruction*—Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or a private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

then the county superintendent shall order the parent, guardian or other person in parental relation to send such child, or children, to school the remainder of the school year. Failure on the part of the parent, guardian or other person in parental relation to comply with the order of the county superintendent shall render such person liable to the penalty provided for in this act.

Sec. 5260. *Penalty for Failure by Parent, etc., to Comply*—In case any parent or other person in parental relation shall fail to comply with the provisions of this act he shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be liable to a fine of not less than $5, nor more than $25, or by imprisonment in the county or city jail not less than two nor more than ten days, or by both such fine and imprisonment in the discretion of the court.

If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years, shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This act shall take effect and be and remain in force from and after the first day of September, 1926.

On the 17th day of December, 1923, appellee filed in the District Court of the United States for the District of Oregon its amended bill of complaint, which reads in part as follows:

IX

"That said pretended law is void and violates and contravenes the Constitution of the United States and more particularly section 10 of article I of the Constitution of the United States, and section 1 of article XIV of the amendments to the Constitution of the United States in that it deprives plaintiff of its property without due process of law, denies to plaintiff the equal protection of the laws and impairs the obligations of plaintiff's contracts.

X

"That said defendants and each of them now publicly declare and publish that said pretended law is a valid law of the state of Oregon, and publicly declare and threaten that they and each of them will enforce said pretended law from and after the date it becomes operative by its terms.

XI

"That by reason of said pretended law and defendants' threat to enforce the same when it becomes operative by the terms thereof, plaintiff's said business is now being destroyed and rendered valueless and plaintiff is now being deprived of its property rights therein; and plaintiff's said property is being depreciated in value and large percentage thereof rendered wholly valueless. That by reason of said pretended law and defendants' threat to enforce the same, parents and guardians are refusing to enter into contracts with plaintiff for placing their sons and wards in said elementary department of school and are withdrawing their sons and wards from said elementary department in said school and placing them in other schools of a like nature which are not threatened with destruction. That,

by reason of said pretended law and defendants' threat to enforce the same, pliantiff is unable to enter into contracts for future supplies and equipment and for alterations, improvements and repairs in connection with said school, without which contracts plaintiff's said business can not be conducted at a profit, and plaintiff is unable to obtain loans from financial institutions and elsewhere to meet its future needs in conducting said business. That unless defendants are restrained from threatening to enforce said pretended law as soon as it becomes operative by the terms thereof plaintiff will suffer an irreparable injury for which it has no plain, speedy or adequate remedy at law.

"Wherefore, plaintiff prays that said pretended law be declared to be unconstitutional and void and that this honorable court grant unto plaintiff an interlocutory writ of injunction enjoining and restraining defendants and each of them from publicly threatening to enforce said pretended law on and after September 1, 1926, and from publishing and declaring that said pretended law is a valid law of the state of Oregon, and that upon the final hearing of this cause said injunction be made perpetual and that plaintiff have such other and further relief as to the court may see equitable."

A motion to dismiss the said amended bill of complaint was filed by the defendants, and the cause, with its companion case of the Society of the Sisters of the Holy Names of Jesus and Mary versus the same defendants, was heard by three judges, and a judgment entered and filed in said cause on the 31st day of March, 1924, overruling the said motion to dismiss and enjoining the defendants and each of them from publishing and declaring that said act is a valid law of the state of Oregon, and from threatening to enforce said act from and after the 1st day of September, 1926, and from attempting to enforce said act from and after said date. The matter is brought to this court by an appeal from the said judgment order.

ASSIGNMENTS OF ERROR

The appellants assign for error:

I

That the court erred in enjoining the enforcement of the statute enacted by the electors of Oregon under the initiative on the 7th day of November, 1922, and set forth at large in the seventh paragraph of the amended bill of complaint, which statute is also set forth as chapter one of the General Laws of Oregon for the year 1923 in the compilation of the said General Laws of Oregon officially published by the State of Oregon.

II

The court erred in holding the statute set forth at large in the seventh paragraph of plaintiff's amended bill of complaint, which statute is also described as chapter one of the General Laws of Oregon for the year 1923 as violative of the constitutional rights of plaintiff.

III

The court erred in holding that the statute set forth at large in the seventh paragraph of the amended bill of complaint of plaintiff and published as chapter one of the General Laws of Oregon for the year 1923 is unconstitutional and void.

IV

The court erred in holding that plaintiff is in a position to raise the legal questions relied upon by it and determined in its favor by the above entitled court on the 31st of March, 1924.

V

The court erred in failing to sustain the motion of defendants to dismiss plaintiff's amended bill of complaint.

VI

The court erred in failing to hold that plaintiff's suit is prematurely brought and that the injunction prayed for by plaintiff should for this reason be denied.

VII

The court erred in passing an injunction order as against the defendant, Walter M. Pierce, as Governor of Oregon.

VIII

The court erred in passing an injunction order as against the defendant, Isaac H. Van Winkle, as Attorney General of Oregon.

IX

The court erred in passing an injunction order against the defendant, Stanley Myers, as District Attorney for Multnomah County, Oregon.

X

The court erred in restraining the expression and publication of the opinions of the defendants as to the constitutionality of the statute adopted under the initiative by the people of Oregon on the 7th of November, 1922, and published as chapter one of the General Laws of Oregon for 1923.

XI

The court erred in passing an injunctive order which fails to specify the acts on the part of defendants which are enjoined except only the expression and publication of the opinions of defendants set forth in the ninth assignment of error.

XII

The court erred in passing an injunctive order vague and uncertain as to the acts undertaken to be restrained and enjoined.

XIII

The court erred in holding that the statute so adopted under the initiative on the 7th day of November, 1922, and set forth at large in the seventh paragraph of the amended bill of complaint which statute is also published as chapter one of the General Laws of Oregon for the year 1923 in the official compilation of the said laws, is in conflict with the Constitution of the United States and particularly with the Fourteenth Amendment thereto.

POINTS AND AUTHORITIES

I

The fourteenth amendment does not remove or restrict the power of the states to enact laws necessary to promote the health, safety, peace, morals, education or general welfare of its people.

Munn v. People of Illinois, 94 U. S. 278, 24 L. Ed. 77, 83;

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989, 992;

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357;

Mugler v. Kansas, 123 U. S. 623, 666, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273;

Powell v. Pennsylvania, 127 U. S. 678, 8 S. C. R. 992, 32 L. Ed. 253, 255, 257;

Re Kemmler, 136 U. S. 436, 449, 34 L. Ed. 519, 524, 10 Sup. Ct. Rep. 930;

Crowley v. Christensen, 137 U. S. 86, 34 L. Ed. 620, 623;

Jones v. Brim, 165 U. S. 180, 182, 41 L. Ed. 677, 678, 17 Sup. Ct. Rep. 282;

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 649, 651, 652;

Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. Ed. 111, 115;

McLean v. Arkansas, 211 U. S. 539, 53 L. Ed. 315, 319, 320;

Middleton v. Texas Power & L. Co., 249 U. S. 152, 63 L. Ed. 527, 531;

N. O. Gas Light Co. v. Louisiana Light, etc., Mfg Co., 115 U. S. 650, 29 L. Ed. 516, 520;

Slaughter House Cases, 16 Wall. 22, 21 L. Ed. 394, 404-410;

Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, 1080;

Sanitary District of Chicago v. United States, Advance Opinion No. 161, October Term, 1924, January 5, 1925.

II

The provisions of a corporation charter and of any law pursuant to which a corporation may have entered into valid contracts, are subject to modification and annulment under the police power.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989, 992;
Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, 1080;
The Mayor, etc., of the City of New York v. Miln, 11 Peters 102, 9 L. Ed. 648, 660;
Eagle Insurance Co. v. State of Ohio, 153 U. S. 449, 38 L. Ed. 778, 780;
Chicago B. & Q. Co. v. State of Nebraska ex rel. Omaha, 170 U. S. 59, 52 L. Ed. 948, 953;
Pacific Gas & E. Co. v. Police Court, 251 U. S. 22, 64 L. Ed. 112, 117;
Thornton v. Duffy, 254 U. S. 361, 65 L. Ed. 304, 309;
Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. Ed. 1084, 1087.

III

As to minors, the state stands in the position of parens patriae and may exercise unlimited supervision and control over their contracts, occupation and conduct and the liberty and right of those who assume to deal with them.

State v. Shorey, 48 Or. 396, 398;
Stettler v. O'Hara, 69 Or. 519;
State v. Bunting, 71 Or. 259;
Gibbons v. Gibbons, 75 Or. 500, 503;
Merges v. Merges, 94 Or. 246, 252;
State v. Bailey, 157 Ind. 324, 59 L. R. A. 435, 537;
Sturges & Burn Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. Ed. 245, 249;

Muller v. Oregon, 208 U. S. 412, 52 L. Ed. 551, 555;
Starnes v. Albion Mfg. Co., 147 N. C. 566, 61 S. E. 525, 17 L. R. A. (N. S.) 602, and notes, 15 Ann. Cas. 470, and notes;
People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794;
Berea College v. Commonwealth, 123 Ky. 209, 94 S. W. 623, 13 Ann. Cas. 337;
State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739;
Commonwealth v. Roberts, 159 Mass. 372, 34 N. E. 402;
State v. Counort, 69 Wash. 321, 124 Pac. 910, 41 L. R. A. (N. S.) 95;
Meyer v. Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 1045, 1046;
Schouler on Domestic Relations, 5th Ed., Sec. 235, 20 R. C. L. 597;
In re Turner, 49 Kan. 115, 145 Pac. 871, Ann. Cas. 1916E, 1022, 1024;
Vanwalters v. Board of Children's Guardians, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431, 432;
State v. Rose, 125 La. 462, 51 So. 496, 26 L. R. A. (N. S.) 821;
Ex parte Powell, 6 Okla. Cr. Pr. 495, 120 Pac. 1022, 1028;
Egoff v. Board of Children's Guardians, 170 Ind. 238, 84 N. E. 151, 155;
U. S. v. Behrendsohn, 197 Fed. 953;
Beauchamp v. Sturges Mfg. Co., 231 U. S. 320, 58 L. Ed. 245, 249, L. R. A. 1915A, 1196;
Interstate Company v. Massachusetts, 207 U. S. 79, 52 L. Ed. 111, 115, 12 Ann. Cas. 555, 557.

ARGUMENT

The statute involved in this proceeding is intended to compel all children between the ages of eight and sixteen years to attend public schools, with certain exceptions not material to this case. It applies to parents, guardians or other persons having control or charge or custody of such children, and provides a penalty.

It is not contended that appellee is directly affected in the sense that it could be punished for violation of the statute. Its claim of right to institute this suit is based upon property damage which it alleges will result to it from the enforcement of the law and is now being sustained by it by reason of threats on the part of the appellants to enforce the law.

It might be urged that under such circumstances the appellee cannot invoke the aid of this court to protect it from incidental injury and damages that may result from the enforcement or threatened enforcement of the law.

Rosenthal v. New York, 226 U. S. 260, 271, 57 L. Ed. 212, 217, Ann. Cas. 1914B, 71, 74;
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. Ed. 364, 368;
Arkadelphia Mill Co. v. St. Louis Co., 249 U. S. 134, 149, 63 L. Ed. 517, 526;
Middletown v. Texas Power Co., 249 U. S. 152, 157, 63 L. Ed. 527, 531;
Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 65 L. Ed. 165, 170;
Marye v. Parsons, 114 U. S. 325, 29 L. Ed. 205, 206;
Hagood v. Southern, 117 U. S. 52, 29 L. Ed. 805;
Ex parte Ayres, 123 U. S. 443, 31 L. Ed. 216, 226;
McCabe v. Atchison Ry., 235 U. S. 151, 162, 59 L. Ed. 169, 174;

However, it will be to the manifest interest of all persons concerned if the court will disregard all technical questions involving delay and proceed to the determination of the constitutional question. With that end in view, argument upon any question regarding the incapacity of appellee to bring this suit and whether or not the suit is premature is waived.

Point No. I

It was early announced by this court that it is "easier to determine whether particular cases come within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate".

Stone v. Mississippi, 16 Wall. 62, 25 L. Ed. 1079, 1080;

N. O. Gas Light Co. v. Louisiana Light, etc., Mfg. Co., 115 U. S. 650, 29 L. Ed. 516, 520.

So many different conditions and circumstances have required consideration that this appellant will presume to take time and space necessary for a brief resume of the principles announced by the court in some of the leading cases.

In *Munn v. People of Illinois,* 94 U. S. 278, 24 L. Ed. 77, 83, the court, by Mr. Chief Justice Waite, in discussing the scope of the fourteenth amendment, said:

> "When one becomes a member of society, he necessarily parts with some rights or privileges, which, as an individual not affected by his relations to others, he may retain. 'A body politic,' as amply defined in the preamble of the constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good'."

In *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. Ed. 989, 992, this court, by Mr. Justice Bradley, said:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."

In *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. Ed. 205, 210, the court, by Mr. Justice Harlan, said:

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, or as to what all must concede, the courts will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

In *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253, 257, the court, by Mr. Justice Harlan, said:

"... The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured

not of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot box, and not to the judiciary. The latter can not interfere without usurping powers committed to another department of government.

"It is argued, in behalf of the defendant, that if the statute in question is sustained as a valid exercise of legislative power, there is nothing to stand in the way of the destruction by the legislative department of the constitutional guaranties of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to enactments ascertained to be plainly forbidden by the constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between coordinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislatures. Nevertheless, if the incompatibility of the constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretense of protecting the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land."

In *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643, 651, the court, by Mr. Justice Harlan, said:

"* * * We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best known, way to which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148, 158, 24 Sup. Ct. Rep. 124."

In *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 52 L. Ed. 111, this court, by Mr. Justice Holmes, said (page 115, L. Ed.):

"If the fourteenth amendment is not to be a greater hamper upon the established practices of the states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed.

"Education is one of the purposes for which what is called the police power may be exercised. *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357. Massachusetts always has recognized it as one of the first objects of public care. * * *"

In *McLean v. Arkansas*, 211 U. S. 539, 53 L. Ed. 315, 319, this court, by Mr. Justice Day, said:

"The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts, supra, Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148, 158, 24 Sup. Ct. Rep. 124.

"If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

In *Middleton v. Texas Power & L. Co.*, 249 U. S. 152, 63 L. Ed. 527, 531, this court by Mr. Justice Pitney, said:

> "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. *Rosenthal v. New York*, 226, U. S. 260, 271, 57 L. Ed. 212, 217, 33 Sup. Ct. Rep. 27. Ann. Cas. 1914B, 71; *Patsone v. Pennsylvania*, 232 U. S. 138, 144, 58 L. Ed. 539, 543, 34 Sup. Ct. Rep. 281; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 649, 650, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678; *International Harvester Co. v. Missouri*, 234 U. S. 199, 215, 58 L. Ed. 1276, 1283, 52 L. R. A. (N. S.) 525, 34 Sup. Ct. Rep. 859; *Koekee Consol. Coke Co. v. Taylor*, 234 U. S. 224, 227, 58 L. Ed. 1288, 34 Sup. Ct. Rep. 856; *Miller v. Wilson*, 236 U. S. 373, 384, 59 L. Ed. 628, 632, L. R. A. 1915F, 829, 35 Sup. Ct. Rep. 342.
>
> "The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. * * *"

Point No. II

One of the alleged grounds of illegality is: "That said pretended law denies to plaintiff the equal protection of the laws and impairs the obligation of plaintiff's contracts."

In answer to that objection, citations from a few of the cases in which it has been considered by this court follow.

Boston Beer Co. v. Massachusetts, 97 U. S. 25; 24 L. Ed. 989, 992:

"* * * The plaintiff in error boldly takes the ground, that, being a corporation it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

* * * * * * *

"The legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, solus populi suprema lex; and they are to be attended and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama* (Ante. 302)."

Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079, 1080:

"All agree that the legislature can not bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.' *Metropolitan Bd. of Excise v. Barrie,* 34 N. Y., 657; *Boyd v. Alabama,* 94 U. S. 645, 24 L. Ed. 302. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes

within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. * * *"

Thornton v. Duffy, 254 U. S., 361, 65 L. Ed., 304, 309:

"We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the Constitution of the state, as much a part of both as if expressed in them (*Douglass v. Pike County,* 101 U. S. 677, 25 L. Ed. 968), and we are unable to yield to the contention that the legislation or the requirement transcends the power of the state, or in any way violates the Constitution of the United States. The law expressed the constitutional and legislative policy of the state to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employe, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions. There was an attempt at the accommodation of the new policy to old conditions in the concession to employers to deal directly with their employes, but there was precaution against failure in the provision of section 22, giving discretion to the commission to withdraw the concession. After a few years' experience, that discretion was turned into a duty, and by the amendment of March 20, 1917, the concession was taken away from those employers who indemnified themselves by insurance. This was considered necessary to execute the policy of the state, and we are unable to yield to the contention that property rights or contract rights had accrued against it. To assert that the first steps of a policy make it immutable is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new, and we

have heretofore been invoked to pronounce judgment upon it. Complying, we said that an exercise of public policy can not be resisted because of conduct or contracts done or made upon the faith of former exercises of it, upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & N. R. Co. v. Mottley,* 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265."

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. Ed. 1084, 1087:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired if that company be held subject to the operation of subsequent statutes, regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain or prohibit insurance companies incorporated in Illinois from further continuance in business. This position can not be sustained, consistently with the power which the State has, and upon every ground of public policy must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they may be withdrawn or reclaimed by the State, in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett v. Taylor,* 9 Cranch, 51; Ang. & Ames, Corp. (9th ed.), sec. 774, note."

Point No. III

The inherent right of parents to the custody and control of their minor children is recognized and protected in every civilized nation. No more intimate relation exists in human society, and the life and welfare of such children are so dependent upon the protection and care of the parents as to afford no basis for argument regarding the nature of the parents' rights. It is equally well established that in matters relating to the general welfare of such children and of the public the rights of the parents are subject to the paramount right of the state to exercise control over such minors. This is well illustrated by the decisions of this court and numerous decisions of other federal courts, and of state courts, relating to the hours and places of employment of minors, compulsory vaccination, compulsory school laws, the custody of the children of divorced parents and of those who are incompetent mentally, morally or otherwise, to afford them such care and protection as the state may deem proper and necessary.

The only limitation upon such power on the part of the state is that it shall be exercised for a reasonable purpose and bear some reasonable and necessary relation to the health, morals or welfare of the child and of the state.

The superior right of the state to prescribe qualifications of teachers, uniform text books, courses of study, and other things which affect the personal rights and interests of pupils and parents is well established.

Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 356, 272, 273, 274, 275;

O'Connor v. Hendrick, 184 N. Y. 421, 77 N. E. 712, 7 L. R. A. (N. S.) 402.

RECOGNIZED CONTROL OF EDUCATION

In accordance with the foregoing principles, we are accustomed in this country to recognize the control by the state of the education of children.

Berea College v. Commonwealth, 123 Ky. 209, 94 S. W. 623, 13 Ann. Cas. 337, 24 U. S. 45, 53 L. Ed. 81,

In this case the Kentucky court upheld the validity of a statute requiring the segregation of the white and the colored races in the schools.

It is also well settled that the state in the exercise of the police power may require the compulsory education of children. Our research discloses the significant circumstance that there are but few cases in which this principle has been decided. The reason doubtless is that the American people with almost entire unanimity have acquiesced in the enactment and enforcement of compulsory education laws. Such authorities as there are bearing on the question speak with entire unanimity and the principle on which some of them are decided is broad enough to uphold the constitutionality of the statute now in question.

There is much significance in the fact that every state in the Union has a statute providing for the compulsory education of children. In five of the states the statutes resemble the Oregon statute in that attendance at a private school is not of itself a compliance with the statutory requirements. See

General Statutes of Connecticut of 1918, vol. 1, sec. 835, 839.

Laws of Maryland, 1916, c. 506, sub-chapter 21, sec. 162.

Birdseye, Cumming & Gilbert's Consolidated Laws of New York, 2d Ed. vol. 2, article 23, sec. 623.

Laws of Nevada, 1920-1921, c. 157, sec. 1, amending sec. 203 of the Act of March 20, 1911.

General Laws of Vermont, 1917, sec. 1254.

35 Cyc. 1122.

"A compulsory education law is not unconstitutional as an invasion of the natural right of a parent to govern and control his own children, as it is competent for the legislature to compel parents to perform the natural duty of education owed to their children."

State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. R. A. 739.

This case involved the validity of the compulsory school law of New Hampshire, for a violation of which the defendant had been convicted. We quote from the opinion of the court:

"The motion to quash the complaint on the ground that the statute upon which it was founded is unconstitutional was properly denied. The statute is as follows: 'Every person having the custody and control of a child between the ages of eight and fourteen years, residing in a school district in which a public school is annually taught, shall cause such child to attend the public school all the time such school is in session, unless the child shall be excused by the school board of the district because his physical or mental condition is such as to prevent his attendance for the period required, or because he was instructed in the English language in a private school approved by the school board, for a number of weeks equal to that in which the public school was in session, in the common English branches, or, having acquired those branches, in other more advanced studies. Any person who does not comply with the requirements of this section shall be fined $10 for the first offense, and $20 for every subsequent offense.' Pub. Stat. chap. 93, sec. 14; Laws 1901, chap, 61, sec. 1. That education of the citizen is essential to the stability of the state is a proposition too plain for discussion. As a mere generalization of our own, it would command immediate and universal assent. But it rests upon a firmer foundation. The constitution declares that

knowledge and learning, generally diffused through a community' are essential to the preservation of a free government. Const. Art. 82. * * *

"Being without brief or argument from the defendant, we are not advised upon what ground he asserts the unconstitutionality of the act. Certainly, it is not unconstitutional, merely because, in obedience to the mandate of the constitution, and for 'the preservation of a free government,' it interferes in some measure with the natural right of parental dominion. 'When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others' (Bill of Rights, Art. 3), and subject themselves to innumerable restrictions and regulations for the common good."

The court then proceeds to construe the statute as impliedly permitting a parent to keep a child out of school when the child's health required such absence. The court then proceeds to say:

"One whose child is stricken by some malady, making detention from school reasonably necessary in defense of the child's life, breaks no law of this jurisdiction by hastening for doctors and nurses instead of to the board of education. On the other hand, if he keeps his child from school merely to suit his own or his child's pleasure, or for any other reason not within the exceptions provided by the act or guaranteed by the constitution, he must suffer the penalty. Indeed, as thus limited, the law is a decided invasion of the parental domain; but, being repugnant to no provision of the constitution, and being for 'the benefit and welfare of this state, and for the governing and ordering thereof,' the citizen, in fulfillment of the social compact, must yield submission and obedience. *School Board v. Jackson*, L. R. 7 Q. B. Div. 502; *Burdick v. Babcock*, 31 Iowa, 562, 568-571; *Donahoe v Richards*, 38 Me. 379, 391, 395-397, 61 Am. Dec. 256; Schouler, Dom. Rel. 235."

It is true that the question mooted in the above case was whether or not the court could read into the statute the implication that a sick child was excused from attendance at school. The case nevertheless involved the validity of the New Hampshire statute and the court of necessity held the statute valid and applicable. The statute by its terms applied to all of the children in the state except those who were excused by the school board. There was no requirement in the statute that the school board should excuse any child and the statute therefore was on all fours with the Oregon statute in requiring attendance at the public schools.

Commonwealth v. Roberts, 159 Mass. 372, 34 N. E. 402.

The Massachusetts compulsory education law contained the following provisions:

> "* * * But, if such child has attended for a like period of time a private day school approved by the school committee of such city or town, or if such child has been otherwise instructed for a like period of time in the branches of learning required by law to be taught in the public schools, * * * such penalties shall not be incurred."

The defendant was charged with failure to send his child to the public school in accordance with the requirement of the statute. He offered to show that the child had been instructed in the branches of learning required by law to be taught in the public schools in a private day school not approved by the school committee, application for such approval having been made and refused. The court refused to admit the testimony and the defendant was convicted. In construing the statute the Massachusetts court said:

"Sending a child to a private day school approved by the school committee is enough to comply with the requirement of the law without further inquiry. Pub. St. c. 47, sec. 2, prescribes what private day schools may be so approved. But if the person having a child under his control, instead of sending him to a public school, or to a private day school approved by the school committee, prefers to have him instructed otherwise, it will be incumbent on him to show that the child has been instructed for the specified period in the required branches of learning, unless the child has already acquired them. This permits instruction in those branches in schools or academies situated in the same city or town or elsewhere, or instruction by a private tutor or governess, or by the parents themselves, provided it is given in good faith, and is sufficient in extent. If the school committee has not approved of a particular school, or has expressly refused to approve of it, then the person having control of a child, if he sends the child to that school, must take the responsibility of being able to prove that he has been sufficiently and properly instructed there. He has no such responsibility if he sends the child to a private day school approved by the school committee. The evidence which was excluded should have been admitted. Verdict set aside."

State v. Counort, 69 Wash. 321, 124 Pac. 910, 41 L. R. A. (N. S.) 95.

This case upholds the validity of the compulsory education statute of the state of Washington. The case holds that a father cannot defend a criminal prosecution by showing that he is qualified to teach his daughters and was in fact conducting a school for them in his home at the time when he was charged with failing to send them to the public school.

[illegible]

[illegible] delivered in the above-entitled cause on the 4th of June, 1923, contains the following sentence:

> "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instruction in English, is not questioned."

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

does not involve a direct danger to morals, decency, or of life or limb. Such legislation is not an unlawful interference with the parents' control over the child or right to its labor, nor with the liberty of the child; *People v. Ewer*, 141 N. Y. 129 (36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788), affirming *In re Ewer*, 70 Hun, 219, (24 N. Y. Supp. 560).

"2. Laws prohibiting the employment of adult males for more than a stated number of hours per day or week are not valid unless reasonably necessary to protect the public health, safety, morals or general welfare, because the right to labor or employ labor on such terms as may be agreed upon is a liberty or property right guaranteed to such persons by the Fourteenth Amendment to the Constitution of the United States and with which the state can not interfere: *Lochner v. New York*, 198 U. S. 45 (25 Sup. Ct. 539, 49 L. Ed. 937). But laws regulating the right of minors to contract do not come within this principle. They are not sui juris and can only contract to a limited extent. They are wards of the state and subject to its control. As to them, the state stands in the position of parens patriae, and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health and morals of its future citizens. * * *"

In *Stettler v. O'Hara*, 69 Or. 319, 332, it is said:

"When new conditions arise which injuriously affect the health or morals or welfare of the public, we no longer say that we will expand the police power to reach and remedy the evil. Instead, we say that a new evil has arisen which an old principle of government—the police power—will correct."

In *Gibbons v. Gibbons*, 75 Or. 500, 503, a suit involving the custody and support of minor children of divorced parents, the court said:

"1. Minor children of divorced parties remain the wards of the court which dissolved the bonds of matrimony, and, as such children were not parties to the suit, they are not bound by any decree as to the source or extent of their maintenance: *McFarlane v. McFarlane*, 43 Or. 477, 484 (75 Pac. 139). The welfare of these infants is paramount to the rights of any other person, and their support and education should be borne equally by their parents if they are able, but, if not, then by the father or mother who is financially responsible. The court granting the decree of divorce is authorized to modify it at any time so as to provide for the care, custody and support of the minors, and may impose such burden upon either or both parties to the suit: (Section 514, L. O. L.)"

In *Merges v. Merges*, 94 Or. 246, 252, it is said:

"Primarily, therefore, under our statute, the parents have equal rights to the custody of their children. Where this is in dispute it is universally conceded that the controlling consideration, paramount above all others, is the welfare of the child. It is not a chattel like pigs, chickens or furniture, to be divided between the divorce litigants on the basis of monetary value; neither is its custody to be made the vehicle for a continuation of their antagonisms and resentments toward each other. It is a matter of almost tragic regret that parents should break up their home by their bickerings and deprive their child of that nurture and admonition that congenial parents can give. But such things happen, and out of the wreck the courts must do the best possible under the circumstances for the welfare of the offspring. The preferences of the parents, whether founded in spite or in real affection, must yield to the best interests of the child. The authorities are practically unanimous on this subject. The principle is conceded in the argument and it is not necessary to note precedents in support of this conclusion."

State v. Bailey, 157 Ind. 324, 59 L. R. A. 435, involved a question of the validity of a compulsory education law which was assailed upon the ground that it invaded the natural right of a man to govern and control his own children. At page 437 of the report in L. R. A. the court said:

> "The next question presented is whether the statute is an unauthorized invasion of the natural rights of the appellee as a parent. The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and regulated by municipal laws. One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes, not to the child only, but to the commonwealth. If he neglects to perform it, or wilfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods during certain years of the life of such children have not only been upheld as strictly within the constitutional power of the legislature, but have generally been regarded as necessary to carry out the express purposes of the Constitution itself. Ind. Const. art. 8, secs. 1-8; *Hochheimer, Custody of Infants*, sec. 79; Fraser, Parent & Child, 77; *Bennet v. Bennet*, 13 N. J. Eq. 114; *English v. English*, 32 N. J. Eq. 738; *Re Bort*, 25 Kan. 308, 37 Am. Rep. 255; *People v. Ewer*, 141 N. Y. 129, 25 L. R. A. 794, 36 N. E. 4; *Sheers v. Stein*, 75 Wis. 44, 5 L. R. A. 781, 43 N. W. 728; *Lally v. Fitz Henry*, 85 Iowa, 49, 16 L. R. A. 681, 51 N. W. 1155. 'The matter of education is deemed a legitimate function of the state, and, with us, is imposed upon the legislature as a duty by imperative provisions

of the Constitution. . . . The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment, and to do so would be to invade the province which by the constitution is assigned exclusively to the lawmaking power.' *State v. Clottu,* 33 Ind. 409, 411. To carry out the enlightened and comprehensive system of education enjoined by the Constitution of this state, a vast fund, dedicated exclusively to this purpose, has been set apart. Revenues to the amount of more than $2,000,000 annually are distributed among the school corporations of the state. No parent can be said to have the right to deprive his child of the advantages so provided, and to defeat the purposes of such munificent appropriations."

In *People v. Ewer,* 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, the constitutionality of a statute prohibiting the employment or exhibition of girls under 14 years of age as dancers or in theatrical exhibitions was involved. The court, by Mr. Justice Gray, said (page 797 in 25 L. R. A.):

"The proposition is indisputable that the custody of the child by the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child, and as its natural guardian, is held to the performance of certain duties. To society, organized as a state, it is a matter of paramount interest that the child shall be cared for, and that the duties of support and education be performed by the parent or guardian, in order that the child shall become a healthful and useful member of the community. It has been well remarked that the better organized and trained the race the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory

education by parents of their children, and to their punishment for cruel treatment; and which limit and regulate the employment of children in the factory and the workshop to prevent injury from excessive labor. It is not, and can not be disputed, that the interest which the state has in the physical, moral, and intellectual well-being of its members warrants the implication and the exercise of every just power which will result in preparing the child in future life to support itself, to serve the state, and in all the relations and duties of adult life to perform well and capably its part."

The statute in nowise interferes with the custody of children. No parent who is now entitled to the custody of his children will lose such custody under the operations of this statute. The statute in nowise prevents a parent from instructing his children in any subject whatsoever. It has no direct reference or application to the operation of appellee's school . Appellee may still operate its school. During the entire school day it may instruct children under eight years of age and over 16 years of age. It may board children between these ages and, after they have attended public school during the hours at which such attendance is compulsory, appellee may exercise its control over these children in any proper way.

CONCLUSION

The growth of the public school system has been gradual. During the early history of the country, owing to sparse population in many localities and the poverty of the settlers, public schools for all could not be maintained, and, as a matter of necessity, parents were left to provide for the education of their children as best they could. Consequently many children grew up without even the rudiments of an education. Some were educated, at least to some extent, by parents, and the education of others was provided for by private schools.

The necessity for any other kind of school than that provided by the state has ceased to exist. The public school is everywhere recognized as being an institution vital to the welfare of the individual citizen, and to that of the state and nation. The state, at great expense, has provided everything in the line of facilities for the education of youth in the public schools that experience has indicated to be to their best interests. To that end, institutions devoted exclusively to the instruction and training of teachers have been founded and are being maintained. Such institutions are conducted by specialists in matters pertaining to the education of the young, and, as a result, the methods of instruction and means of promoting the health and education of the children in the public schools have been greatly improved in recent years. Our public school buildings, as now constructed, represent the result of experience and great expense in providing for the physical and intellectual welfare of the children who are trained therein.

The welfare of minor children is a matter in which the state is interested to such an extent that it has asserted the right to take a babe from its mother's arms

and deprive her of its custody, training and society, if it is apparent that the welfare of the child or of the public requires such action.

No attempt has been made on the part of appellee to show that the training received by children who attend its schools is superior to that which they would receive in the public schools, and no such condition or result could be shown. Comparison of private schools with those maintained by the state will not reveal a degree of superiority of the former which justifies a demand to be permitted to continue same as a right guaranteed by the Constitution.

Appellee demands, as a right guaranteed under the Constitution of the United States, the right to conduct an institution for the instruction of children of common school age in opposition to the public schools maintained by the state, in order that it may therein give military training which is no part of the training in public schools and would not be permitted therein.

If a few such institutions can lawfully be maintained, the number which may ultimately be so maintained can not consistently be limited, and if this court should hold that the state does not have the right to require all children within its borders to be educated in its public schools, such institutions may, without constitutional restriction, develop a syqstem of educational training which will result in doing away with public schools.

Appellee places great reliance upon the recent case of *Meyer v. Nebraska* (262 U. S. 390, 67 L. Ed. 1042), and its companion cases. We quote from the opinion of Mr. Justice McReynolds in that case as follows:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the fourteenth amendment. 'No state * * * shall deprive any person of life, liberty or property without due process of law.'
>
> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Truax v. Raich*, 239 U. S. 33, L. ed. 131, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Adams v. Tanner*, 244 U. S. 590, 61 L. ed.

1336, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; *New York L. Ins. Co. v. Dodge*, 246 U. S. 357, 62 L. ed. 772, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918F, 593; *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124; *Adkins v. Children's Hospital* (April 9, 1923) 261 U. S. 525, ante, 785, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 394; *Wyeth v. Board of Health* (Wyeth v. Thomas), 200 Mass. 474, 23 L. R. A. (N. S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499.

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

"Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable—essential, indeed, to the public welfare. Mere knowledge of the German language can not reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to

teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

"The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The supreme court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' *Nebraska Dist. v. McKelvie,* 108 Neb. 448, 187 N. W. 927 (April 19, 1922). Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."

This appellant submits that, when given its broadest interpretation, the said decision does not apply to the situation presented by the instant case.

As we understand the case of *Meyer v. Nebraska, supra,* it involved the right of an individual to engage in the occupation of teaching and the right of parents and children to have their children receive instruction in German in a parochial school which was conducted pursuant to statute. We understand the effect of that decision to be that there did not appear to be any such immediate demand for the discontinuance of such instruction, to the deprivation of the right of the teacher to engage in his profession and of the liberty of the parents and children to demand instruction in the German language, as to warrant such legislation. The gist of the opinion appears to us to be contained in the following excerpt therefrom (page 1046 of Report of 67 L. Ed.):

"The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the supreme court. *Adams v. Tanner*, 244 U. S. p. 594, 61 L. ed. 1342, L. R. A. 1917 F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition, with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

"As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals, or understanding of the ordinary child."

In this connection we beg leave to call to the court's attention the following excerpt from the dissenting opinion of Mr. Justice Holmes in the case of *Truax v. Corrigan*, 257 U. S. 312, Sup. Ct. Rep. 312, 376, 66 L. Ed. 254, 268:

"I must add one general consideration. There is nothing that I more deprecate than the use of the fourteenth amendment beyond the absolute compulsion of its

words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. * * *"

The case of *Adams v. Tanner*, 244 U. S. 590, 61 L. Ed. 1336, is urged by appellee as being conclusive of the questions involved in the instant case.

As we understand that case, it involved the right of a citizen of the United States to engage in a useful and usual occupation. The statute involved was held by the court to be prohibitory, rather than regulatory, and we understand the court to have held (page 1343 Rep. in 61 L. Ed.):

> " 'The fourteenth amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations which may, or may not, be harmful to the public, according to local conditions, or the manner in which they are conducted.' *Murphy v. California*, 225 U. S. 623, 628, 56 L. ed. 1229, 1232, 41 L. R. A. (N. S.) 153, 32 Sup. Ct. Rep. 697."

We submit that the said case presents a question quite distinct from one involving the right of a state to require that all children between the ages of eight and sixteen years attend schools which are provided and maintained by the state as a part of its governmental functions, and the personal right or liberty of parents to have

their children attend a private school, when it does not appear that the training received by the children in such private schools is superior in any way to that which they would receive in public schools, and when it does appear that the liberty claimed to be denied by such a law is liberty to give military instruction in connection with common school training; a thing which no one would have the temerity to demand as part of the course of instruction in the public schools.

Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. Rep. 7, 60 L. Ed. 131, L. R. A. 1916D, 545 Ann. Cas. 1917B, 243. In that case it was held (page 134, Report in L. Ed.):

"* * * Being lawfully an inhabitant of Arizona, the complainant is entitled under the fourteenth amendment to the equal protection of its laws. The description, 'any person within its jurisdiction', as it has frequently been held, includes aliens. * * *"

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"It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure.

* * * * * * *

once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it can not be denied that the authority exists to make its measures to that end effective. *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44. If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employes to be aliens, or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (*Consolidated Coal C. v. Illinois*, 185 U. S. 203, 207, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; *McLean v. Arkansas*, 211 U. S. 539, 551, 53 L. ed. 315, 321, 29 Sup. Ct. Rep. 206; *Miller v. Wilson*, 236 U. S. 373, 384, 59 L. ed. 628, 632, 35 Sup. Ct. Rep. 342); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law."

For reasons heretofore stated in connection with argument regarding the effect of the decision of this court in the cases of *Meyer v. Nebraska, supra,* and *Adams v. Tanner, supra,* we submit that the decision in the case of *Truax v. Raich* is not controlling as to the issues involved in the instant case.

Terrace v. Thompson, Advance, Sheet No. 3, p. 35, U. S. Supreme Court Advance Opinions, December 1, 1923. This case presents a question involving the rights of aliens and upholds a statute denying to them the right to own or control agricultural land, as constituting a reasonable exercise of the police power, pursuant to a federal law withholding from certain aliens, whose rights were involved, the privilege of naturalization. It distinguishes the rights of such aliens from the rights of aliens involved in the case of *Truax v. Raich, supra.* We refer to this case because it contains a recent expression of this court regarding the police powers of the states in matters of public policy.

Appellant again invites the attention of the court to the rule stated in *Powell v. Pennsylvania,* 127 U. S. 678, 32 L. Ed. 253, 256-257, and other cases involving the validity of statutes enacted in the exercise of the police power for the purpose of meeting conditions which the legislature deemed it advisable to correct, and in enacting which the legislature is presumed to have investigated the questions of fact upon which its conclusion that such legislation was required were based, that the legislature is the exclusive judge of the necessity for such legislation and that where the question presented to the court involves the determination of matters of fact this court will not investigate such questions or pass upon the necessity for such legislation.

In this case it is to be presumed that the legislature and the people of the state investigated the question of the necessity for such legislation and found and determined, as a question of fact, that the instruction given to children of the ages affected by the amendment in the public schools of the state was better and more complete than that provided by private institutions; that facilities for protecting the health of such children when in school were better provided for in the public schools than in private institutions, and that every other fact upon which such legislation might properly be based, was inquired into by them and found to require such legislation. In that respect the case differs materially from that of *Meyer v. Nebraska, supra,* where the court was enabled to take judicial notice of the fact that the mere teaching of the German language did not in and of itself have such an effect as to warrant an exercise of the police power denying to one, who depended upon the giving of such instruction as a means of livelihood, the right to teach that language, or such effect as to warrant depriving parents of their right to have their children so instructed.

Respectfully submitted,

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